REPORTS

OF

POINTS OF PRACTICE

&c. &c. &c.

DETERMINED IN CHAMBERS BY THREE JUDGES OF THE COURTS OF QUEEN'S BENCH AND COMMON PLEAS.

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CHAMBER REPORTS

OF CASES.

BEFORE THE JUDGES OF THE COURTS OF QUEEN'S BENCH AND COMMON PLEAS.

McKAY v. DEARMID.

Right to take out second summons where first abandoned—Sufficiency of affidavit—Rule of Court, E, T., 4 Vic. No. 4.—Irregularity.—Interlocutory judgment set aside.—Costs.

A party is not precluded from proceeding on a summons because one had been already taken ont and served on the opposite party for the same purpose, but owing to a defect had been abandoned.

An affidavit is *not insufficient* because it does not mention the papers separately which are annexed to it, nor positively state to what such papers are annexed, thereby designating them as "*the annexed are*," &c.

Filing a plea without serving a copy is irregular under rule of Court, E. T., 4 Vic. No. 4, but not such an irregularity as to entitle the opposite party to sign judgment, without applying to the court or a judge.

The affidavit of the service of the copy of the plea should state on whom such service was made and that the paper served was a true copy of the original.

In this case a summons was obtained to set aside the interlocutory judgment as irregular, with costs, pleas having been properly pleaded prior to signing such judgment; or on merits, on reading affidavits and papers filed.

The affidavit was that the "annexed were severally and respectively true copies of the declaration and pleas filed. and of the interlocutory judgment signed therein;" that they were filed in the defend-

ant's office at Woodstock, the declaration on the 5th March, the plea on the 12th March, and the interlocutory judgment on the 13th March; and that the deponent did on the 12th March "serve what to deponent appeared, after comparing the said copy with the original plea so filed as aforesaid, to be a true copy of such last mentioned plea." There was also a common affidavit of merits sworn by the defendant's attorney.

The order was opposed—1st. Because on the day preceding the issue of the summons the defendant had taken out another summons for the same purpose, but which was defective in not referring to the affidavits filed; and the defendant's attorney on the same day, and shortly after serving a copy of this summons, discovered the defect, and gave notice to the plaintiff's attorney that he abandoned it and would not proceed on it, and on the next day took out the present summons: it was insisted this precluded him from moving on the same objection, though he might move on the affidavits of merits.

2nd. Because the papers annexed to the affidavit were not sufficiently identified, as the affidavit did not state *what was* annexed nor to what anything was annexed; in other words, that the affidavit should have stated that "*the papers annexed hereto*" were, &c.,

3rd. Because the affidavit as to the service of the plea was insufficient, not stating on whom it was served; nor that in fact it was a copy, and that filing a plea without serving it was insufficient.

DRAPER, J.—I think the objection as to the first summons having been taken out is going further than the authorities warrant. The application was not heard nor in any way disposed of, the summons never having been proceeded on and the plaintiff having notice it would not be proceeded on. It does not fall within the rule that the court will not allow a party to succeed on a second application, who has previously applied for the very same thing, without coming properly prepared, and who failed in consequence. If the defendant had applied to amend the summons in order to re-serve it, I think the amendment would have been allowed, and I see no substantial difference.

2nd. I also think the objection too rigid, though I should be very glad to see a settled practice to mark all papers attached to an affidavit with some letter or figure and to refer to them by such letter or figure in the affidavit, and also that the commissioners administering the oath should certify on each paper attached that it is the paper referred to in the affidavit by the letter or figure it bears. But I am not aware that such a strictness has been held necessary, and therefore I shall not give weight to this objection.

3. I agree that the affidavit is defective in stating a service of copy of the plea. It should state on whom the service was made, and not leave it to conjecture whether it was a true copy or not; and if I felt that the non-service of a copy, where the original has been filed, entitled the plaintiff to sign judgment, I should certainly think this affidavit

insufficient to set such judgment aside; but, though filing a plea without serving a copy may be irregular as a non-compliance with the rule of court, Easter Term, 4 Vic. No. 4, which requires that a copy of every declaration and subsequent pleading shall be served on the opposite party, I do not think the irregularity such as to entitle the plaintiff, without application to the court or a judge, to sign judgment, and thus virtually take the plea off the file. It is very analogous to the case of a demurrer filed whithout any cause assigned on a notoriously frivolous cause, and I think a similar course should be taken. The defendant however, for all that he sufficiently shews, is irregular in not serving a copy of his plea; and, though I think the interlocutory judgment should be set aside, yet considering this to be, as far as I know, the first application under such circumstances, I shall give no costs. See 8 A. & E. 427; 7 A. & E. 519; 5 A. &. E. 780; 5 Q. B. 597; 6 M. & W. 546; 7 M. & W. 142; 9 M. & W. 829; 8 Jur. 60; 2 D. & L. 946; 2 Dowl. N. S. 898; 9 Dowl. 1021; 14 Jur. 1096.

GIBB ET AL. v. KEEGAN.

Judgment as in case of non-suit.—Affidavits.

On a rule for judgment as in case of non-suit for not going to trial, time was given to obtain an affidavit from the plaintiff, who lived at a distance, that the suit was settled, but no such affidavit being filed at the expiration of the given period, the rule was made absolute.

This was a rule for judgment as in case of non-suit for not going to trial according to the practice of the court, issue having been found in the month of December, 1849.

An affidavit of the plaintiff's attorney was filed on shewing cause, by which it appeared that he was instructed by one of his clients who resided in Montreal that the debt had been arranged, and that the costs were also to be paid, and that in consequence thereof he had not proceeded in the cause. The affidavit further stated that there was not time to get an affidavit from the plaintiff in Montreal of the facts.

DRAPER, J.—If in truth the cause has been settled as represented, this rule ought to be discharged with costs; and I think it should stand over until the first day of next term, in order to give time to the plaintiff to file a further affidavit of the facts, and thus enable the court to dispose of the matter properly.

Hilary, 14 Vic.—No such affidavit has been filed, and therefore the rule should be made absolute.

GILLESPIE V. MARSH.

Judgment must be *actually* signed before an order for a reference to the master to compute can be made.

This application was for an order to refer the matter to the master, to compute principal and interest upon the note upon which this action was brought.

It seemed from the affidavit on the part of the plaintiffs that the action—whether assumpsit or debt was not stated, though it must be presumed to be assumpsit—was brought upon a note made by one J. C. Spragg, and endorsed by the defendant's intestate, and that the defendant demur-

red to the declaration upon which the Court of Common Pleas gave judgment for the plaintiffs.

The application was opposed on the ground that no interlocutory judgment was signed, and that until such judgment be signed there could be no order made for reference.

Burns, J.—The judgment upon demurrer when for the plaintiff is either an interlocutory or a final judgment, according to the nature of the action. If final, the rule for judgment is sufficient authority to the clerk to sign the final judgment. If it be necessary that the plaintiff's damages be ascertained before final judgment be signed, then the judgment is only interlocutory; and the damages must be ascertained either by assessment in the ordinary way or by a reference to compute.

The defendant's objection is this, that though the court pronounced judgment upon the demurrer in favour of J. C. Spragg, yet that it is necessary a judgment should be actually signed in the office before this application be made, and I am of opinion practice clearly is so.

Moses v. Compton (6 M. & S. 381), shews that the defendant is right in the objection, and the books of practice also state that it is necessary judgment should be signed.

The summons must therefore be discharged with costs.

HIGSON v. PHELAN.

Defendant arrested under bailable writ.—Costs.—49 Geo. III., ch. 4.—Plaintiff's costs.—What "recover" refers to.

Where a defendant arrested under a bailable writ, has obtained a rule granting him his costs under the provincial statute 49 Geo. III., ch 4, the plaintiff is not entitled to tax costs on entering upon the judgment.

The effect of the first clause of this statute is to deprive the plaintiff of all his costs of suit. And the word "*recovered*" in the latter part of this clause, as well as the word "*recover*" in the former part, refers to the amount for which the *verdit* was *given*.

The single question here was, whether where a defendant has obtained a rule granting him his costs under the provincial statute 49 Geo. III., ch. 4, the plaintiff is entitled to tax costs on entering upon the judgment. The statute enacts, that in all actions wherein the defendant shall be arrested and held to bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant shall have been so arrested, and held to special bail, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such actions shall have been brought, provided it shall be made appear to the satisfaction of the court, and upon hearing the parties by affidavit, that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid, and provided that the court thereupon by rule or order direct that such costs shall be allowed to the defendant; and the plaintiffs shall upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall

exceed, and then in such sum only as the same shall exceed, the amount of taxed costs of the defendant and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant to be taxed as aforesaid, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action. to take out execution for such costs in manner as a defendant may now by law have execution for costs in other other cases. The very next section of this act *deprives the plaintiff of costs* in actions on judgments, unless the court or a judge otherwise order.

The Imperial statute 43 Geo. III., ch. 46, sec. 3, is precisely similar to the foregoing, and sec. 4 deprives the plaintiff in like manner of costs in actions on judgments.

DRAPER, J.—The word *recover or recovered*, occurs in two parts of the clause. In the first it is there in all actions wherein the plaintiff shall not recover the amount of the sum for which the defendant shall have been arrested—in the second, the plaintiff shall be disabled from taking out execution for the sum recovered in any such action, unless &c.; and in case the sum recovered in any such action shall be less, &c., then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action, to take out &c. The word, "recovered," in the three cases in which it is there used, refers to one and the same state or stage of the proceedings in the action. Does it refer to the same stage as the word "recover,"

used in the first part of the clause, and to what stage is that referable?

Cammach v. Gregory, 10 East, 525, was an action of debt on bond: defendant pleaded *non est factum;* usury; set-off. All the issues were found for the plaintiff, who took a verdict with 1*s.* damages and 40*s.* costs. Defendant had been held to trial for 65*l.*, and by plaintiff's admission at the trial only 50l. was due. The court were of opinion that the verdict being merely for nominal damages, and the judgment for the penalty of this bond and the last being taken for a less sum than such penalty, the case was not within the act, "which only gives the court jurdisdiction to award costs for the defendant after verdict for the plaintiff, in cases where the plaintiff shall not recover *(which means by the verdict of a jury,")* according to the real estimate of the damages, the amount, &c.

Rouveroy v. Alefrom, 13 Ea. 90.—Defendant was arrested for 50*l.*, and paid 20*l.*, which the plaintiff, after giving notice of trial, took out and stayed further proceedings. The court adverted to the cases cited, where the act had been laid only to relate to cases where the plaintiff did not *recover (meaning by the verdict of a jury)* the amount of the sum for which he had arrested defendant, &c.

Butler v. Brown, similar to Davey v. Renton.—The plaintiff had taxed the costs of arrest and suit, after taking the money out of court. The motion was for reviewing the taxation, disallowing the costs of plaintiff, and taxing defendant his costs.

Clarke v. Fisher, 1 Smith, 428—The rule was to shew cause why plaintiff should not be prevented from entering upon judgment and taking out execution for his costs; and Garrow, in arguing in support of it, treats the statute as enabling the court to deprive the plaintiff of his costs. The court take no notice of this, but refuse the rule, defendant having paid money into court under the usual rule, which was always drawn up on payment of plaintiff's costs up to the time of paying the money into court.

Davey v. Renton, 2 B. & C. 711, is similar to Rouveroy v. Alefrom—holding that when money is paid into court by defendant, in an early stage of the cause, that is not a sum recovered by plaintiff within the meaning of the act: "It is the sum accepted by the plaintiff in lieu of the sum which he might perhaps have recovered if *he had proceeded to judgment*."

Keene v. Deeble, 3 B. & C. 491—Defendant was arrested in assumpsit for 28*l.* and paid 2*l.* into court. The cause was entered for trial, but before being called was, with all matters in difference, referred, the costs of the cause and reference to abide the event. Award for plaintiff for 1*l.* 19*s.* beyond the 2*l.* paid in. It was urged that here the plaintiff had not accepted the sum, and two cases from Tidd's Practice (1018, 6th Ed.) were relied on, as to which Bayley, J., observed, that in them a verdict was taken upon which judgment was afterwards entered, and the money was therefore recovered in the action. Abbot, C. J., says—"It is manifest the legislature contem-

plates a recovery by a verdict, wherefore judgment should be afterwards entered." Littledale, J., says—"I think the word 'recovered,' as used in this statute, bears the technical legal sense recovered by the consideration and judgment of the court." All the court were of opinion that money awarded on such a reference, &c., of the cause and all matters in difference, was not money recovered within the meaning of the act.

Brooks v. Rigby, 2 A. & E., 21—Plaintiff arrested defendant for 20*l.* Defendant paid 12*l.* into court, and pleaded payment under the new rule. Plaintiff took the money out. Defendant applied for costs. The court held, that the fact of payment appearing on the record, as directed by the new rules, instead of the judgment being made as formerly under rule of court, made no difference; Taunton, J., adding—"The plaintiff does not *recover* the sum paid in, for the rule (sec. 19) only enables him on accepting it to sign judgment for the costs.

Holden v. Raitt, 2 A. & E., 445—Assumpsit: plaintiff arrested defendant for 180*l.* The cause and all matters in difference therein were referred before declaration by judge's order, and "that the costs of the said suit and the costs of the reference and award shall abide the event, in like manner as upon a verdict." Award for 55*l.* The order of reference was afterwards made a rule of court, and the plaintiff's costs taxed at 75*l.* 15*s.* Defendant moved for his costs—refused, as the statute did not contemplate a recovery on such a reference as this,

though if the award were under an order of *nisi prius*, empowering the arbitrator to direct how the verdict is to be entered, the judgment of the court takes effect as if there were a regular verdict—as said by Abbot, C. J., "The arbitrator is merely substituted for the jury, in fixing the amount for which judgment was to be entered."

Thompson v. Atkinson, 6 B. & C., 193—Defendant was arrested for 179*l.* A verdict was given for plaintiff, subject to award. All matters in difference between the parties were referred, and the costs of the cause were to abide the event of the award. The award was, that at the commencement of the suit defendant owed plaintiff 45*l.* 18*s.*; that plaintiff had no reasonable or probable cause to arrest for 179*l.*, and that for the arrest the defendant was entitled to compensation or damages 20*l.*; and therefore that the plaintiff should only take the verdict for the balance, 25*l.* 18*s.* Defendant applied for his costs. The court refused it, as by the term of the reference the costs were to abide the event of the award, and that was for plaintiff, and as all matters had been referred, defendant's claim to compensation for the arrest was referred, and damages allowed him on that account.

Rowe v. Rhodes, 4 Tyr., 216; 2 Cr. & M., 379—Plaintiff arrested for a much larger sum than was afterwards paid into court and afterwards taken out by him, but the court held the defendant not entitled to costs under the statute. Vaughan, B., says (4 Tyr. 22)—"Were the question *res integra*, we should look to the words of the statute and sift the meaning of the

word recover. That word, however, as used in the acts, points to recovery or verdict or judgment in the action and to execution thereon.

Weaver v. Birdsall, 12 Price 734—The court held, *dub.* Hullock, B., that the statute contemplates a recovery by verdict, as distinguished from a recovery by money being paid into court and taken out by plaintiff. It appeared that the plaintiff's costs had been taxed up to the payment of the money into court and were paid by the defendant before the application was made, but no reference to this fact is made on the argument or judgment.

Bradley v. Milner, 1 Bing. N. C. 738—The defendant was allowed his costs, having been arrested for 65*l.* 16*s.* 6*d.* and the verdict being for 44*l.* 4*s.* 10*d.*, and "it was ordered that under this rule the defendant should not have his costs of an unsuccessful application for a new trial, *and that the plaintiff should not have his costs of resisting* that application."

Rennie v. Yorston, 8 Dowl. 326, 4 Jur. 557—Held too late for defendant to move, after costs have been taxed for the plaintiff. Patterson, J., says he thinks that a good rule to lay down, that it would be a dangerous practice to apply such an application after a taxation by plaintiff had taken place.

Jones v. Jehu, 5 Dowl. 130—When a verdict is taken by consent and subject to a reference, and the arbitrator, taking only the matters in the action into consideration, reduces the verdict to a sum below that for which defendant was arrested, the defendant may apply for his costs under the statute. The

sum will be considered as "recovered," within the meaning of the act.

Linthwaite v. Belling, 2 Smith, 667—Defendant paid money into court which plaintiff took out. The defendant obtained a rule nisi *for plaintiff to pay costs under the statute*. Clarke v. Fisher, was cited, but no observation made on the different form of the rule. The decision against the defendant went on the ground that this was not a "*recovery*."

Turner v. Prince, 5 Bing. 191—Defendant was arrested for 100*l*. Defendant paid 10*l*. 9*s*. 3*d*. into court; a verdict was taken by consent for plaintiff, subject to award. The accounts were completed and the arbitrator awarded to plaintiff 28*l*. 8*s*. 9*d*. beyond the sum paid into court, together with the costs of the award. Plaintiffs costs of the cause were taxed at 68*l*. 6*s*. 8*d*., which sum, with the 29*l*. 8*s*. 9*d*., defendant paid into court under a judge's order staying proceedings till the result of an application to the court should be known. Defendant got a rule calling on plaintff to shew cause why upon payment by plaintiff to defendant of his costs of suit —the sum of 29*l*. 8*s*. 9*d*., the residue of the sum paid into court, under the judges order—should not be paid to plaintiffs in satisfaction of their whole claim. The court discharged the rule on the merits. But the form of the rule nisi suggests that it was assumed the plaints would be entitled to no costs if the defendant succeeded in his motion.

Talbot v. Hodson, 2 March 527—Plaintiff arrested defendant for the penalty of a bond, payable by in-

stalments, some of which were not due—suggesting breaches. The court held that the plaintiff "*recovered*" penalty; and therefore, though they did not decide that the plaintiff was entitled to arrest for that sum, they held the case did not come within the statute. The rule nisi was drawn up in the precise words of the act.

Silversides v. Bowley, 1 Moor, 92, is to the same effect as Jones v. Jehu. The form of the rule nisi was that the defendant should have his costs taxed by the prothonotary and set against the *damages* recovered by plaintiff, as, if such costs exceeded the damages, *i. e.*, the amount of the verdict, then the defendant would get execution for the difference and the plaintiff would not enter any judgment; but if defendant's costs were less than plaintiff's verdict, could not plaintiff enter judgment for the difference and tax costs on entering his judgment?)

Ricketts v. Noble, 3 Ex. 521—Parke, B., remarks on the language of Littledale, J., in Keene v. Deeble, "*The plaintiff may be said to have recovered, within the meaning of the act, if he obtains a verdict.*"

In this case it was held that the English act, 43 Geo. III., ch. 46, had been rendered practically inoperative by the 1 & 2 Vic., ch. 110: the *capias* given by this latter act not being the commencement of a suit but a collateral proceeding for the purpose of obtaining security for the debt. When the 43 Geo. III. was passed there were two modes of commencing suits, one by non-bailable the other by bailable process. *The object of this statute was to restrain*

the latter mode by depriving a plaintiff if he improperly resorted to it, of all his costs of suit. But under 1 & 2 Vic., the arrest may be made at any time before final judgment. There is no choice of the mode of commencing the suit; and in an action properly commenced, in the course of which the defendant gives reason to believe that he is going abroad, the loss of all fair costs seems an appropriate remedy for the wrong committed by the plaintiff.

And see in our own court Bull v. McKenzie, Trin., 1843; Burrows v. Lee, Easter, 3 Vic.; Powell v. Gott, Hilary, 1843; Nicholson v. Allan, Michaelmas, 5 Vic.; McMicking v. Spencer, Hilary, 6 Vic.

The apparently conflicting expression relating to the word "recovered" in some of the cases, and the absence of language expressly depriving the plaintiff of his costs of suit, in the clause of the statute now under consideration, when the very next clause of the statute uses unequivocal language for that purpose, occasioned great doubt in my mind whether by the terms "recovered in action," used in the latter part of the clause, in reference to the sum from which the defendant's costs were to be deducted, was not meant the plaintiff's recovery in the usual way of debt and damages, or damages only (as the case might be), with costs taxed according to the statute of Gloucester, as incident to the recovery of damages.

It is quite clear that the word "*recover*" used in the beginning of the clause, refers to the verdict. The language of several cases is express on this

point and the practice of not permitting the defendant to move *after* the plaintiff has taxed his costs, is in the strictest conformity with that interpretation; for if the defendant's right to move depended upon the question whether the amount which the plaintiff would recover by judgment was less than that for which defendant was arrested, the judgment must be entered before the defendant could move. But the language of Littledale, J., in Keene v. Deeble, can only be referred to the word "*recovered*" as used in the latter part of the clause (and other cases give weight to his opinion); and if recovered by the consideration and judgment of the court be meant as to the sum from which defendant's costs were to be deducted, and not from the sum for which the verdict was rendered, then as it at first appeared to me, the legislature meant to make the defendant's *right* to obtain costs to depend upon the *verdict* being given for a less sum than the plaintiff had been arrested for; but that the defendant's costs were to be deducted from the sum for which the plaintiff would, according to usual practice, obtain judgment, *i.e.*, his verdict and taxed costs.

The earliest case I find on the statute is Clarke v. Fisher, and there the rule nisi was to prevent the plaintiff from entering judgment and taking out execution for *his costs*, and the argument proceeded on the assumption that the statute was intended to deprive the plaintiff of his costs. The form of suggestion to be entered on the roll when the defendant gets a rule absolute, as given in Chitty's Forms to

Archbold's Practice, is also consistent with this, for it commences thus: "Therefore it is considered that the plaintiff do recover against the defendant his debt and damages aforesaid in form aforesaid assessed, and upon this the defendant gives the court here to understand," &c.; whereas the usual form of entry would be for debt and damages, "together with his costs and charges as aforesaid to 40*s.* by the jurors aforesaid, in form aforesaid assessed, and also £ for his costs and charges by the court here adjudged." The last case I see on the statute is Beckett v. Noble. There, Parke, B., says the object of the statute was to restrain a resort to bailable process, "by depriving a plaintiff, if he improperly resorted to it, of all his costs of suit."

The unequivocal construction of the intention of the statute removes any doubt arising from less distinct language, or language apparently leading to a different conclusion in other cases.

The result is that there will be no order to the Master to revise taxation and allow the plaintiff his costs of suit.

THE QUEEN EX REL. LINTON v. JACKSON.

Summons in the nature of a quo warranto—when it should be tested—Construction of 13 *and* 14 *Vic., ch,* 64, *schedule A., No.* 23*—What a sufficient acceptance of office of alderman—Allowance of recognizance—Qualification for alderman for Kingston at election in January,* 1851.

If a summons in the nature of a *quo warranto* is not tested on the day it is issued, it is an irregularity; but if an appearance be entered, the irregularity is thereby waived.

Semble—That the words in 12 Vic., ch. 81, sec. 146, as amended by 13 & 14 Vic., ch. 64, schedule A. No. 23, do not require the writ ordered by the court in term time to be sued out in term time ; but that if the application be made in term, the court shall give the order for the writ : if in vacation, a *fiat* shall be given by a judge for it.

A public declaration of acceptance of office, made in presence of the returning officer and the electors directly after the returning officer had published the result, is a sufficient acceptance under the statute 13 & 14 Vic., ch. 64, schedule A, No. 23.

There is no necessity for taking out a distinct rule or order for the allowance of the recognizance.

The new assessment law, 13 & 14 Vic. ch. 67, does not affect municipal elections until after 31st December, 1851.

The qualification necessary for a person to be elected alderman for Kingston in January 1851, was the same as that required by 9 Vic., ch. 75, ch. 13.

On the 11th of February 1851, *Vankoughnet*, Q. C., moved for and obtained an order in the Practice Court for a writ of summons in the nature of a *quo warranto* directed to the defendant, to shew by what authority he exercised the office of alderman for Ontario Ward in the City of Kingston, and why he should not be removed from the same and the relator declared duly elected in his place.

The order was drawn up on reading the statement of the relator, the affidavits filed in support of the statement, and the recognizance of the relator and his sureties—" and the same being allowed as sufficient " The statement set forth that the relator had an interest in the election as a candidate for alderman ; that the defendant had not been a resident householder within the City of Kingston or such part of the adjacent county of Frontenac within three miles from the Market Square of the city for four ears next before the election held on the 6th and

7th January, 1851. Subjoined to the statement was the affidavit of the relator, "that he believes the ground of objection to the election of Robert Jackson, as mentioned in the foregoing statement, to be well founded." The writ of summons was tested on the 11th February, 1851. It was served on the defendant on the 22nd February, 1851, and was returnable before the Chief Justice or other judge presiding in Chambers in Toronto, on the eight day after the day of service.

The following affidavits were filed in support of the statement and writ:—

1st. That of the relator (on the 4th Feb., 1851), that at the election in question he and the defendant and one Ford were severally candidates for the office of alderman for the said ward, and that there were no other candidates thereat; that the relator received thirty-eight votes, and that both defendant and Ford had a larger number; that defendant and Ford were returned as duly elected aldermen, "notwithstanding that the said Robert Jackson was not eligible to be elected as such alderman, because he was not a resident householder, &c., as in the statement —as he should have been according to the statute in such case made and provided."

2nd. Another affidavit of relator (on the 4th February, 1851), that defendant was not a resident householder; that relator, after the election, examined the assessment books for the township of Kingston for 1848 and 1849, and found that one Maria Jackson appears to have been assessed for part of Lot No.

18, 1st Concession Kingston, supposed to be distant within three miles from the market place, &c., and was thereupon liable to be called upon to pay the assessed taxes, on which she resided during the said years, and still doth reside;" and that defendant's name does not appear on the assessment books of the said township for any property for either of the said years; that during a part of 1846 and the whole of 1859, defendant resided in the dwelling-house on the premises so assessed in the name of Maria Jackson, and not elsewhere; that after diligent enquiry, it does not appear that defendant was or pretended to be a resident householder in any other premises; and that relator believes Maria Jackson was, during those two years, the resident householder and in possession of the premises liable to be and assessed therefor.

3rd. Affidavits of John Dunlop (on the 4th February 1851), that he was assessor for the township of Kingston for 1848-1849; that in 1848, when making the assessment on part of No. 18, 1st concession, he saw defendant on the premises, being the premises wherein defendant was supposed to be a resident householder, and defendant told him said premises did not belong to him (defendant), and that he had nothing to do with them, that his niece Maria Jackson was the proper owner and legally liable to be assessed therefor, and deponent entered her name on the assessment list; that when making the assessment on part of No. 18, 1st Concession, in 1849, defendant told him he (defendant) had no in-

terest whatever in the premises, that his niece Maria Jackson was the owner and liable to be assessed; and deponent put her name on the assessment list accordingly, and she paid the taxes for both years.

4th. Affidavit of James Nickalls (on the 3rd February 1851), that on the assessment books for 1848 and 1849, Maria Jackson is assessed for part of No. 15, 1st concession, Kingston; and that defendant's name does not appear entered upon the assessment books of the township of Kingston for any property for either of those years.

At the return of the summons, a memorandum was endorsed thereon, signed by Macaulay, C. J., who presided at chambers, that the defendant appeared by his attorney Kenneth McKenzie to answer the grounds of objection stated within; whereupon a further day is given to defendant to answer, until the 18th day of March 1851.

On which day Kenneth McKenzie appeared for defendant. He objected—

1st. That the summons was irregular, having been tested on the 11th of February and not having issued until the 17th; whereas it ought to have been tested on the day it issued; and that the 17th being in vacation, no summons on a rule or order of court could *then* issue; for in vacation, the summons should go upon a fiat of a judge. He filed an affidavit of his own (on the 18th March 1851), that he searched in the crown office and found no other order in this matter but one (set forth in substance on the preceding page); that this order is marked or filed

in the crown office on the 17th of February; that the officers in the crown office stated that the order was brought into the office on that day, and a writ of summons issued thereupon on that day against defendant; that no other writ issued against defendant at the relation of Linton, and that there is no other order or fiat filed against defendant.

2nd. That the writ was not warranted by the order; for the order does not set forth the interest of the relator—only recites the statement complaining of the undue election and usurpation of office of defendant, and that relator was duly elected and ought to have been returned.

3rd. That the writ was not applied for within one month of the defendant's acceptance of office. He read defendant's affidavit (on the 1st March 1851). That the election began on Monday the 6th of January, and ended at 4 P. M. on the following day; that Ford had 63 votes, he (the defendant) 53, and the relator 38, at the close of the poll; that the returning officer then declared Ford and defendant duly elected, and made his return accordingly; and that immediately after the close of the election, on the 7th of January, the defendant, in presence of the returning officer and electors, accepted the said office; and since such acceptance has, in all matters and things, acted as alderman, &c.; that he has been a resident householder in the township of Kingston adjacent to the city, and not more than 3 miles from the market-square, for four years next before his election; and that in September or October 1846, he took posses-

sion with his family, of a dwelling-house on No. 18, 1st concession, which he bought from the heirs of Col. Foster, and lived therein under said purchase until the twelfth of January, 1848, when he made a transfer to Maria Jackson, but continued to reside therein as the tenant of Maria Jackson until the 27th of October 1849, when the property was resold to defendant, and he and his family have since resided therein ; that he has occupied the premises as owner or tenant from October 1846 to the present day, and still occupies, as they are within three miles of the market-square. He read also the affidavit of the returning-officer (on the 3rd March, 1851), stated among other things, that shortly before the close of the poll, on the second day of the election, the relator said to him, " that there was no use in keeping open the poll any longer—that his friends had deceived him—the election had been carried fairly ;" that he returned Ford and defendant as duly elected, and that defendant then, in his presence and the presence of the electors, declared his acceptance of the office and his intention to act. Upon these affidavits, he contended that defendant had completely—or at least sufficiently—accepted the office on the 7th of January, and therefore that the writ should have been applied for within one month of that time ; and that it was not by taking the oath of qualification that acceptance was evidenced, since he contended that the statute 13 & 14 Vic. ch. 18, rendered the taking such oath unnecessary.

4th. That there was no sufficient allowance of the

recognizance. He also contended the that effect of the different enactments was, that for want of the assessment law taking effect, no other qualification than being a natural born or naturalized subject of her Majesty of the age of twenty-one years was necessary. But if the qualification of being a resident householder, as stated by the relator, was necessary, then he filed affidavits to shew he was qualified

1st. The affidavit of the defendant (on the 11th March 1851) in answer to Dunlop's affidavit: That Dunlop said to him—"This is a fine property of your own, Captain Jackson; you are putting a great quantity of manure on it, and no doubt you will make a nice place." And that defendant answered abruptly, that he owned the property once, but had sold it, and had no interest in it then—meaning the freehold; that though he told Dunlop to put Maria Jackson's name on the assessment roll, it was because she was the owner, but defendant was then tenant with his family; that defendant was cautious in answering Dunlop, suspecting his motives, as defendant was then *embarrassed*; identifies *deed* annexed) copy substituted by consent) as that from Maria Jackson to him; identifies receipt annexed (copy as before) signed by Maria Jackson, and the money therein mentioned paid to her, among other things, for the use and occupation of the dwelling house to the date of receipt, as from 12th January 1848 to 27th October 1849. Affidavit of Maria Jackson (on the 6th March 1851) corroborating

defendant's affidavit in the material particulars as to tenancy and payment of rent.

Affidavit of Martin Keeley (on the 8th March, 1851), that he was subscribing witness to the deed, and saw her sign the receipt, and saw the money, 53*l.* 7*s.* 6*d.*, paid by defendant to Maria Jackson; that defendant's wife and family lived in the dwelling-house and premises mentioned in the deed, being part of No. 18, 1st concession Kingston, since the fall of 1846, without intermission. Deponent living within a few hundred yards of the said house and premises knows that defendant and his family occupied the same from the fall of 1846 to the present day.

Affidavit of David Rutherford (on the 10th March 1851), that in the fall of 1846 he gave up possession of the premises to defendant, and that defendant with his family has lived there ever since, and that the premises are less than three miles from the Market Square.

Affidavit of Thomas Kirkpatrick, Esq., (on the 1st March, 1851), to the same purport.

Affidavit of Edwin A. Burrowes (on the 1st March 1851), to the same purport.

Affidavit of James Sampson (on the 10th March, 1851), to the same purport.

Draper, J.—1st. I have no doubt the summons should be tested on the day it was issued, and that this irregularity might have been taken advantage of by motion to set it aside, though probably the relator would have been allowed to amend upon payment of costs. But as an appearance to it was entered,

this irregularity was waived; and after appearance. I do not think the objection can be entertained; and therefore the case does not call for a decision on the point whether, if amended in the teste, which would then be a day in vacation, as the 17th February, it could have been issued on the order of the court in term, though I incline to think there is nothing in that objection, and that the words in the 146th section of 12 Vic. ch. 81, as amended by 13 & 14 Vic. ch, 54, as follows—"which writ shall issue out of either of her Majesty's superior courts of common law in Toronto, upon an order of such court in term time, or upon the fiat of a judge thereof in vacation"—do not render it necessary that the writ ordered by the court should be sued out in term time and cannot be sued after, but that the enactment means, that if the application be made in term the court shall give the order for the writ; if made in vacation, that the fiat shall be given by a judge for it—the writ being in either case tested of the day on which it issues.

2nd. I am of opinion the order warrants the writ. The order is drawn up on reading the statement and affidavits, and they are all to be referred to, and the interest of the relator as a candidate sufficiently appears by them.

3rd. This objection involves several considerations. What is an acceptance of the office. I do not find in the statutes [secs. 5 & 6 Wm. IV. ch. 75; 1 Vic. ch. 78] any provision [as there is in the Municipal Corporations' Act in England], pointing

out any distinct form or mode of acceptance. The first act required to be done in the election of the head of the municipal corporation—the 12 Vic. ch. 81, sec. 24, appoints the first meeting of township municipalities for the second Monday next after the election. Sec. 35 directs the County Council to meet on the 4th Monday in January to elect a county warden, and sec. 66 appoints town councillors to meet on the second Monday next after the election (which by sec. 63 is to begin on the first Monday in January) to elect a mayor; and by sec. 83 the provisions in these matters and others applicable to incorporated towns are extended to cities. The 127th section requires an oath of office to be taken "*before entering upon the duties of his office*," so that the taking of this oath would appear to be at all events direct *proof* of acceptance. The 129th section also requires every person elected under the act to any office requiring a qualification of property, "*before he shall enter into the duties of his office*," to take and subscribe an oath in the form given, of his qualification. And the 130th section enacts that every qualified person duly elected to be [among other officers] alderman of any town or city, who shall refuse such office, or refuse or neglect to take the oath of office and that of qualification within twenty days after his election and his having notice thereof, shall forfeit a penalty, &c. This contemplates a refusal to take the office as distinct from a refusal to take the oaths, and leads to the conclusion that the acceptance may be evidenced otherwise

than by taking them—as the refusal of the office may be, it would seem, evidenced otherwise than by neglect or refusal to take the oaths.

The 146th section, as amended by No. 23 of schedule A of 13 & 14 Vic., ch. 64, provides that no costs shall be awarded against any person against whom a summons in the nature of a *quo warranto* shall be brought, who shall within one week after having been served with such writ, transmit a disclaimer of the office to the effect following—that he disclaims the office, and declines all defence of any right he may have to the same, unless it be proved that he was a consenting party to being put in nomination as a candidate. If a consent before election to be put in nomination as a candidate may subject a party to costs, should his election be contested and he should disclaim, I do not see why a declaration publically made immediately the result of the election is promulgated by the returning officer may not, in the absence of any provision in the statute, be considered as evidence of acceptance. Such acceptance may well precede the taking the oaths, which is required "before entering on the duties of the office." I apprehend that the penalty for refusal might be incurred in less than twenty days after the election and notice thereof, though twenty days are allowed within which the oath may be taken. It is not however necessary to decide this point as to the refusal and as to the acceptance, inasmuch as the statute distinguishes between refusing the office and refusing or neglecting to take the oaths;

and as no specific mode of acceptance is pointed out, I am of opinion the public declaration made in presence of the returning officer and the electors directly after the returning officer had published the result, is a sufficient acceptance of the office.

Then the same section [146] as amended, provides that the summons shall "*be applied for*" within six weeks after the election complained against, "or within one month after the person whose election is questioned shall have accepted the office, and not afterwards." Here, in my view of the law, the acceptance took place on the 7th January, and the writ was moved for on the 11th February, more than a month after the acceptance, but within six weeks of the election.

The defendant contends that whenever there is an acceptance, the application must be made within a month from the date thereof; and under any circumstances within six weeks from the election, whether any acceptence has taken place or not. The relator, on the other hand, insists that he has six weeks from the day of election at all events, and a further time of one month from the date of the acceptance of office, if that month extends beyond the period of six weeks after the election. The opinion I have arrived at on the merits renders it unnecessary for me to found my judgment on this point, and I therefore abstain from pronouncing a decision on it, though I should think it prudent not to delay proceedings to set aside an election beyond the six weeks.

4th. I think there is nothing in the objection as to the allowance of the recognizance. The order for the issue of the writ of summons expresses that it is allowed; and there is no necessity, in my opinion, for taking out a distinct rule or order for its disallowance. It would be a useless expense, in a case required to be disposed of in a summary manner.

5th. There is some obscurity and confusion as to the qualification required under the different enactments. The 8th Vic., ch. 75, incorporated the city of Kingston. Sec. 13 enacts that no person shall be eligible to be elected as alderman unless he had been a resident householder within the city or some part of the adjacent county of Frontenac, within three miles from the Market Square of the city, for four years next before the election, and being so resident at the time of the election shall at that time be possessed to his own use of real property within the city in freehold assessed under the then last assessment list at 40*l.* or more, or shall be possessed of real property for years or from year to year, which shall be assessed as aforesaid at 50*l.* or upwards; or shall be in the receipt of 50*l.* or upwards of yearly rent or profit accruing from or out of real property within the city.

By sec. 14, no person not a natural born or naturalized subject of her Majesty, or under twenty-one years of age, is eligible.

Sec. 26 disqualifies certain persons, but does not affect defendant.

This act is repealed upon, from and after the 1st

January, 1850 ; but the third section of the repealing statute (12 Vic. ch. 80) provides that until an act "for a more just, general system of assessment in Upper Canada shall be passed, or other legislative provision be made in that behalf, so much of the several acts mentioned in the schedules to this act annexed, as establish, provide for or regulate the assessment or mode of assessment, or the property to be assessed in any of such cities or the liberties thereof, or in any such towns and villages, or any matter relating to the same, shall continue in force as if such acts or parts of acts had in the said schedules been specially excepted from repeal, and all such acts and parts of acts shall extend and apply to every such city and the liberties thereof, and to every such town and village respectively according to the extended or altered limits thereof as established by" the next act, ch. 81.

Then sec. 82 of ch. 81 provides that no person shall be qualified to be elected an alderman who shall not at the time of the election be seized to his own use of real estate held by him in fee simple or in freehold, within the city for which he is elected or the liberties thereof, of the assessed value of 500*l.*, or unless he shall be a tenant from year to year or for a term of years of real property within such city or the liberties thereof, at a *bona fide* rental of 60*l.* per annum or upwards, or shall be in the receipt of 60*l.* or upwards of yearly rent or profit accruing from or out of real property within such city or the liberties.

And sec. 121 enacts that no person shall be quali-

fied to be elected except a natural born or naturalized subject of her Majesty of the full age of 21 years.

Then comes the 208th sec. of ch. 81, as amended by No. 36 of schedule A, to 13 and 14 Vic., ch. 64, by which all the provisions of ch. 81, as to persons having any property qualification, or being assessed for any amount to qualify him to vote or to be elected, are suspended until a new assessment law for Upper Canada is passed, and all persons who had a right to vote or to be elected at the annual township elections for district councillors, shall have the right of voting or being elected for township and village councillors; and those who heretofore had the right to vote or be elected at the municipal elections for any city, town, or village, shall have a similar right at elections under this act, and the persons entitled to vote or be elected at the municipal elections of every town or village not incorporated before this act shall be the resident male inhabitants, householders or freeholders of the age of twenty-one, subjects by birth or naturalization, and who have resided in such town or village six calendar months next previous to the election: provided that the qualification for a township councillor shall be 100*l.* instead of 300*l.*; or in lieu of 100*l.* of real property, real and personal property together amounting to 200*l.*; and provided as to towns and villages not incorporated before the passing of ch. 81, every person to be elected a councillor shall be seized to his own use in fee of lands within the county or union of counties within which the town or village lies, or

in the adjoining county or union, of the real value of 100*l.* above all incumbrances; and provided that where a provision exists in cities or towns for the registering of votes, the same shall continue until repealed or amended by by-law of such city or town; Provided also, that whether any new assessment law shall or shall not be passed prior to this act [ch. 81, 12th Vic.] coming into force, the persons hereinbefore in this section described as entitled to elect and be elected until such new assessment law shall have been passed, shall be those entitled to elect and be elected respectively: And provided also, that any town the act of incorporation of which had been disallowed or had expired before the 1st January, 1850, shall be taken and held to be an incorporated town within this section.

And the 17th sec. of 13 and 14 Vic., ch. 64, enacts that the 208th sec. of ch. 81, as amended by the latter act, shall continue in force until the 31st December, 1851; and the persons therein described as entitled to elect and be elected under the same shall be those entitled to elect and be elected at all the municipal elections to be held under the said act previous to that day.

Therefore the new assessment law, 13 and 14 Vic., ch. 67, does not have any effect on the municipal elections until after the 31st December, 1851.

Taking the different provisions into consideration, I have arrived at the conclusion that the whole qualification required by the 9th Vic., ch. 75, sec. 13, was still necessary to be possessed by the person

elected as alderman at the election in January, 1851 —that is, that he should be a resident householder within the city or within the county of Frontenac at a distance from the Market Square of the city not exceeding three miles, for four years next before and at the time of the election, and be possessed of property as that section sets forth and requires, as well as that he should be a subject by birth or naturalization of the full age of twenty-one years.

I do not see how this case at all gives rise to the question suggested, whether, since the passing of the act 13 and 14 Vic., ch. 18, an oath of qualification is necessary. It does not appear that the defendant has not taken such oath, and no such objection is raised by the relator.

The only objection to the validity of his election which the statement contains is, that he has not been a resident householder, as required by the enactments alluded to above, for four years next before the election.

I think the weight of testimony is clearly in defendant's favor on this point, and that the *prima facie* case made out by the affidavits filed on behalf of the relator is sufficiently met and answered. The change of ownership was consistent with the continuance of residence as the householder; and though, as suggested by the relator's counsel on the argument, the change of title and ownership, without any change of possession or occupation, might give rise to doubts as to the *bona fide* nature of the transaction, yet if it be true (and it is clearly proved

by several witnesses) that defendant during the years that Maria Jackson held the title and was assessed, lived in the dwelling-house with his family as he had done before the conveyance to Maria Jackson and since the reconveyance from her, he was, if the conveyance were fraudulent and void, the resident householder and owner also; and if the conveyance were valid, the resident householder and tenant. Either would suffice under the act, which does not make it necessary that the candidate for election should be assessed for the dwelling-house wherein he is or has been resident as an ingredient in that part of the qualification.

Being of opinion, therefore, that the defendant has established himself to be a resident householder, and no other objection being taken to his election or appearing in the evidence before me, I am of opinion that the office of alderman for Ontario Ward in the city of Kingston be allowed and adjudged to the defendant; and that he be dismissed and discharged from the premises charged on him, and do recover his costs of defence.

THE QUEEN EX REL. SHAW v. MACKENZIE.

Municipal Council.—Summons in the nature of a "quo warranto."—12 Vic., ch. 81, 13 & 14 Vic., ch. 51.—Power of judge under.—Sufficiency of allegation of relator's interest.—Proof of, how far necessary.—Effect of ordering writ.—Property qualifications.—9 Vic., ch. 75.—Costs.

[As to the first four objections, see Queen ex rel. Linton v. Jackson. As to the necessity of qualification, see ditto.]

The Practice Court has power to issue an order for a summons in the nature of a "*quo warranto*," under 12 Vic. ch. 81, sec. 146, and 13 & 14 Vic. ch. 51, sec. 3.

Where a relator declares that he has an *interest in the election*, as a voter for *said ward;* this coupled with a previous complaint that defendant was unduly elected alderman &c., sufficiently identifies him as declaring himself to be a *municipal voter*, though he does not use the precise term *municipal voter*, required by the statute 12 Vic. ch. 81., sec. 146.

An objection that, though elector's interest is sufficiently alleged, there is no sufficient proof of it, to enable the court or judge to order the issue of the writ, cannot be urged on the return of the writ, where such allegation is not denied, and no proof offered to shew that relator had not the interest claimed.

The interest of the relator is not established by the ordering of the writ.

It is not necessary under 9 Vic. ch. 75, sec. 13, that the property should be assessed in the name of the person possessed of it to his own use. A landlord is so possessed whose tenants occupy the premises, and he may put together real properties, some occupied by himself and some by tenants, to make up the assessed value required by the statute.

The writ of summons was applied for by *Vankoughnet*, Q. C., and ordered by the Practice Court in Hilary term last, on the same day and tested in like manner and sued out on the same day as that in the preceding case against Robert Jackson. It was founded on the statement of S. Shaw, complaining of the undue election of, and usurpation to office of alderman of Sydenham Ward, in the City of Kingston, by the defendant; "declaring that he the said relator hath an interest in the said election, as a voter for the said ward;" and objecting to the election of the defendant, on the following grounds:—

1st. That the defendant at the time of the election, wa not possessed to his own use and benefit of real

property within the City of Kingston, in freehold, which was assessed under the then last assessment list at 40*l.* or upwards.

2nd. That defendant was not at the time of the election possessed to his own use and benefit of real property within the said city, for a term of years or from year to year, which was assessed under the then last assessment list at 50*l.* or upwards.

3rd. That defendant was not at the time of the election in the receipt of 50*l.* or upwards of yearly rent or profit arising from or out of real property, within the city.

The affidavit of the relator attached to the statement was confined to his belief that the ground of the objection to defendant's election was well founded.

The only additional affidavit in support of the statement was made by the relator on the 5th of February, 1851; setting forth that at the election on the 6th and 7th January, 1851, of two aldermen for Sydenham Ward, City of Kingston: defendants, A. J. W. D. & W. D., were candidates and that defendant and A. J. W. D., were returned as duly elected, notwithstanding that defendant was not eligible, because, (setting out the three objections contained in the statement); that he, the relator, examined the last assessment list of the City of Kingston, and found therein that the real property for which defendant was assessed in Sydenham ward, (being the premises and dwelling house occupied by defendant at the time of the election, and of the assessment) in the sum of 25*l.* and no

more, which assessment was in defendant's name, chargeable to him; that relator also found in the assessment list that the firm of McKenzie & Gildersleeve was assessed in Ontario Ward for 40*l*., and no more: this assessment being in the name of the firm and chargeable to them, for premises occupied or partly occupied by them as a law office; and that no other assessment on any other property in any other ward appeared in any other of the last assessment lists, in the name and chargeable to either the defendant or the firm of McKenzie & Gildersleeve; and that defendant and Overton Smith Gildersleeve composed the firm of McKenzie & Gildersleeve.

Short, the relator, had resided in Kingston for thirty years, had known defendant for the last seven years, and never understood or heard that defendant was at any time in the receipt of any yearly rent or profit whatever from or out of any real property within the City of Kingston.

A sworn copy of the affidavit, made by defendant on the 18th January, 1851, of his qualification to act as alderman, was also put in. It was to the effect that defendant was a natural born subject of her Majesty's, and is "truly and *bona fide* seized of an estate in fee simple within the City of Kingston, of the assessed value of 500*l*., being part of lot. No. 242, in the said city.

On the 18th March, 1851, McKenzie in person defended the case. He made the same four objections in point of form as in the case preceding, against Jackson, and further:—

5th. That the Practice Court could not issue an order for a summons in the nature of a *quo warranto*, relying on the 146th sec. of 12 Vic., ch. 81, as amended, and on the 13 & 14 Vic., ch. 51, sec. 3.

6th. That the relator's interest as a voter was not sufficiently established.

Also contending, as in the former case, that no qualification was necessary, except being a subject by birth or naturalization, of the full age of twenty-one years.

And if a qualification of property was necessary, filing affidavits to shew that he possessed such qualification:

1st. Affidavit of defendant (sworn 1st March, 1851), that the election began on the 6th January (as set forth in relator's affidavit); that votes continued to be polled until about 1 p.m. of Tuesday, the 7th, when the election was finally closed with the consent of all parties concerned; and the defendant and A. J. McD. were declared by the returning officer to be duly elected, and no objection was made thereto; that defendant immediately after, in the presence of the returning officer, the opposing candidate and the electors declared his acceptance of the office; that the firm of McKenzie and Gildersleeve has been paying defendant since the 1st May, 1849, and still are paying a rent of 25*l.* per annum, for part of the premises in Ontario Ward, mentioned in relator's affidavit, as entered on last year's assessment list, in the name of McKenzie and Gildersleeve, for 40*l.*; that one Dennis O'Connell has been

holding another part of the said premises from defendant, and still holds, from December, 1849, at a rent of 12*l.* 10*s.* per annum, and that another portion thereof remains unoccupied, but has been heretofore rented to one William Coverdale at 12*l.* per annum; that the property of defendant in Sydenham Ward, mentioned in relator's affidavit as entered on the assessment roll of last year for 25*l.*, yields to defendant, and has for several years past yielded to defendant an annual profit of 35*l.* and upwards, and has been entered for the amount of 35*l.* on the assessment roll of the present year, and at the actual assessed value of 750*l.*

2nd. Affidavit of Dennis O'Connell (sworn March 1, 1851), that he has been tenant since December, 1849, to Defendant, for part of the building in which the firm of McKenzie & Gildersleeve keep their office, at an annual rent of 12*l.* 10*s.*, and still holds the same at the same rent, that he is a tenant to defendant and not to McKenzie and Gildersleeve; that the premises consists of a large stone building with two outer doors, one entering to deponent's dwelling-house and the other to McKenzie & Gildersleeve's law office, and to the part heretofore occupied by William Coverdale, as tenant to defendant, as deponent believes, which is now unoccupied.

3rd. Affidavit of O. S. Gildersleeve (on the 1st March, 1850), that he is one of the partners of McKenzie & Gildersleeve, which firm have been paying to defendant from the 1st May, 1849, and still do pay him an annual rent of 25*l.* for the premises

occupied by them as offices in Ontario Ward in the City of Kingston.

DRAPER, J.—The observations made upon the first four objections in the case of Linton v. Jackson apply to the same objections raised in this case, and it is unnecessary to repeat them.

5th. At the argument I thought this objection might be found of weight, both under the words of the statute, and because I was under the impression (which was thrown out and not corrected during the discussion) that the court in banc. had power not only to order the writ of summons in the nature of a *quo warranto* to issue, but also to hear the case on the return of the writ and dispose of it; and it struck me as an anomaly, that a single judge sitting in the Practice Court should have the power of adjudication of the case without appeal, when, if the same judge heard it in chambers, an adjudication would not take effect until four days of the next succeeding term had elapsed without any motion being made before the court to alter or reverse it. But there is no such anomaly, for the 146th sec., as amended, provides that the writ shall issue out of either of her Majesty's superior courts of common law at Toronto, upon an order of such court in term time, or upon the fiat of a judge thereof in vacation, and the said writ shall be returnable upon the eighth day after service, "*before some one of the judges of either of the said courts at chambers.*"

Then as to the statute (ch. 51), it enacts that at any time, when her Majesty's superior courts of com-

mon law at Toronto may by law sit in banc., it shall and may be lawful for one judge of either of such courts to sit in banc., apart from his brethren, either while they are actually so sitting or while their sittings within such time (term?) shall be suspended or adjourned; and every such judge so sitting apart in banc. as aforesaid, shall have all the same powers and authorities as belong to, or may hereafter be vested in either of such courts, touching or concerning, or in any way relating to the business of adding or justifying bail: discharging insolvent debtors, administering oaths, and hearing and determining matters on motion, and making rules and orders in causes and business depending in either of the said courts, in the same manner and with the same force, validity and effect as might be by the courts, in which such causes or business shall be respectively depending.

This statute is nearly word for word similar to the statute under which a single judge sits to dispose of business in term time in England. I find that writs of mandamus are moved for before him, and other motions of a similar character are made, between which and an application like the present I can draw no solid distinction; and I can see no reason therefore why the motion should not be made, the recognizance put in and allowed, and the writ of summons ordered to issue in the Practice Court.

6th. It is objected that the relator's interest is not sufficiently established. The statement declares it to be that of a *voter*, not saying as the 146th sec. does, "a municipal voter;" but I apprehend, de-

claring that he has an interest *in the election*, or a voter for *the said ward;* coupled with the previous complaint that the defendant was unduly elected alderman for Sydenham Ward in the City of Kingston, sufficiently ascertains and defines that it is as a voter at such an election that he complains, and identifies him as declaring himself to be a municipal voter.

I think it enough if the interest claimed is substantially that required by the statute, though the precise term, "municipal voters," is not used.

But it is further objected, that admitting the interest to be sufficiently alleged, there is no proof of it; and I have felt some little hesitation in determining —as nevertheless after consideration I think I ought to determine—that the allegation not being denied, or any proof offered to shew that the relator has not the interest claimed, and such interest being merely descriptive of the character in which the relator seeks to have the writ of summons issued, it cannot be urged on the return of the writ, that there was not sufficient evidence of interest to enable the court or judge to order it.

I do not conceive that by ordering the writ the relator's interest in the character he sets forth in the statement is conclusively established, but that after the summons is issued the character will be considered as sufficiently admitted to require the defendant to disprove it, if he means to rely on that objection as an answer to the application.

7th. I have in the former case expressed my

opinion as to the necessity of qualifications, and the only remaining question is, whether defendant appears to be qualified according to the 9 Vic. ch. 75, sec. 13. Besides being a resident householder, the candidate must possess one of these qualifications set forth :

1st. That at the time of the election he shall be possessed to his own use of real property within the city, in freehold, which shall be *assessed* under the then last assessment list at 10*l.* or upwards.

2nd. Or shall be so possessed of real property for a term of years, or from year to year, which shall be assessed as aforesaid at 50*l.* or upwards.

3rd. Or shall be in the receipt of 50*l.* or upwards of yearly rent or profit accruing, from or out of real property within the city.

The defendant relies on the first of these qualifications, and contends it is made out. First, as to the premises and dwelling house occupied by himself, the relator's own affidavit shews that these were assessed, and in the defendant's own name, in the last assessment list for 25*l.*, and so far his qualification is established. He next contends, that it is not necessary that the real property forming his qualification, in whole or in any part, should be assessed in his name. The object of reference to the assessment was to ascertain the statutory value required; when that is done, he insists that he may *aliunde* shew that he is possessed of the property so assessed to his own use and benefit. He then refers to the relator's affidavit to shew that the property occupied

by McKenzie & Gildersleeve was assessed at the value or sum of 40*l.*; and shews by his own and two other affidavits, that he, the defendant, was possessed of the property, as landlord thereof, to his own use and benefit; and the assessed value of the two properties thus appears to be 65*l.*, while the statute requires 40*l.* or upwards.

Taking the affidavits on both sides into consideration, I am of opinion that the defendant does shew a sufficient qualification according to the act, for I do not think the statute should be construed as required: that the property should be assessed in the name of the person who is possessed of it to his own use.

I think that the landlord whose tenants occupy premises, is in the meaning of the statute *possessed* of such premises *to his own use*, as much as if he were in the actual occupation, and that he may put together, if necessary, real properties, some occupied by himself, some by his tenants, to make up the assessed value required by the statute. It is true this construction may afford a qualification to both landlord and tenant out of the same property, but the same effect may as well arise from the second and third qualifications; the one being that of a tenancy of premises assessed at 50*l.*, the other. the being in receipt of 50*l.* of yearly rent or profit from real property.

I am of opinion, therefore, that the office of alderman for Sydenham Ward in the City of Kingston, be allowed and adjudged to the defendant, and that he be dismissed and discharged from the premises charged on him and do recover his costs of defence.

THE QUEEN EX REL. WOODWARD V. ORTROM ET AL.

Act 12 *Vic. ch.* 81.—*How far certain sections of, apply to town ship municipalities.*

The provisions of 12 Vic. ch. 81, secs. 6 & 7, apply only to cases where the by-law has been made by District Council or shall be made by the County Council, and do not apply to the case of the Township Council.

Therefore, where a township municipality had divided the township into rural wards, and by the same by-law appointed places for the elections; it was held by Burns, J. that it was not necessary for such by-law to have been published in the official Gazette, nor in any newspaper, nor copies thereof to have been posted in each township, nor that a copy thereof, under seal, should have been delivered to the person appointed to hold the election.

It seems that on the 4th November, 1850, the municipality of the township of Huntingdon, in the County of Hastings, passed a by-law dividing the township into rural wards, and by the same by-law appointed places for the elections to be held, and nominated returning officers.

On the 2nd of January, 1851, the Reeve of the township caused notice to be given that the election would not be held by wards, *because legal notices had not been given to the returning officers*, though what notices he intended should be legal was not stated.

On the 6th of January, the regular day of election, two sets of township councillors were elected, one set by ward elections, and the other by a general election for the township. Those who were elected at the general election complained of the three defendants, who were elected by the ward elections, as being usurpers.

The grounds contained in the statement as avoiding

the elections were : 1st that the by-law dividing the township into rural wards was not published in the official Gazette twice before the day of holding the election ; that it was not published in any newspaper at all, though there were two newspapers published in the county ; that the by-law was not posted up in four places in each township, in the county of Hastings, nor any copy posted up at all.

2nd. That the by-law did not appoint places for holding the election.

And 3rd. That a copy of the by-law under seal was not delivered to the persons who were to hold the elections.

The by-law, on being produced, did not appoint places for holding the elections, and that disposed of the two objections ; and with respect to the other objections, they defended upon the construction to be placed upon the 3, 4, 5, 6, 7, 8, secs. of 12 Vic. ch. 81, as amended by ch. 64, sch. A of 1850, and the 9th and 10th sections.

Burns, J.—What the Reeve meant by the returning officers not having a legal notice was, I suppose, what is now contended for—namely, that the returning officer should be furnished with *a copy* of the by-law under seal, and which by-law should have been published as mentioned in sec. 6.

I think that there can be no doubt that the provisions of the 6th and 7th sections apply only to cases where the by-law has been made by the district council, or shall be made by the county council, and do not apply to the case of the county council.

The 8th sec., as amended, is the one which first confers the power on the township council. The 9th and 10th secs. are almost a re-enactment of the provision of the 5th, but they are expressly confined to the township municipality. The township municipality may do by several by-laws what in other cases is compelled to be done in one.

The 3rd sec. provides for the cases of new townships being laid out by the crown, as well as for townships which at the passing of the act had less than 100 resident freeholders and householders; and in such cases we see the correctness and propriety of the provisions of the 6th and 7th secs.

It would, however, be absurd to compel each township, when the inhabitants thereof thought fit to divide themselves into wards, to inform every other township in the county by posting up a copy of the by-law in five of the most public places in each township.

The strongest argument in favour of the provision of the 7th sec. applying, is that a fine of not more than 10*l*, is imposed upon the person required to hold the election, if he shall make default; but I think that is answered by saying that it was necessary to make such a provision, in respect to the carrying out of a by-law of the district or county council, which was made final in its nature, and not under the ordinary powers confined under sec. 41. And further, under the 32nd and 29th subdivisions of the 31st sec., the township has power to pass by-laws, regulating how the office of returning officer

shall be performed and who shall do it, and to fine, in order to enforce the law. Besides, it is not unimportant to observe that in cases of fines by the township municipality, it is limited to 5*l.*; whereas the county municipality may go to 10*l.*

It is not complained of in this case that there was any violation of any internal regulations of the municipal council of the township, nor is it shewn that in fact any internal regulations were made as to how the returning officers were to be informed of their appointment, &c., but the case is put upon the footing of the various provisions of the act, which are already alluded to, being in force, applicable to township by-laws. The application fails upon the grounds taken; and I am not to know there was any rule or regulation of the township council violated, until it shall be established to be so.

Probably the conduct of the reeve has led the parties astray; but then, as appears by the affidavits, the township clerk took a different course, and refused to hold a general election, of which the relator was aware; and, so far as the evidence goes which I have before me, I think the clerk was right.

For these reasons I must dismiss the relator's complaint, with costs to the defendant.

FOLEY V. WHITE AND WIFE.

Arrest of married woman.—Writ set aside.

Where the defendant being a married woman, and known to be so by plaintiff, was arrested on writ of *ca. re.*, both writ and arrest were set aside with costs.

When the writ of *ca. re.* is only against the wife and is irregular against her, the husband cannot be compelled to appear.

On the 5th of November, 1851, a summons issued, calling on the plaintiff to shew cause why the writ of *ca. re.* and the arrest of defendant's wife should not be set aside for irregularity, with costs, and the bail-bond be delivered up to be cancelled, on the grounds :

1st. That said Nancy White was a married woman. —1 Taunt. 256.

2nd. That she was not a resident of the province.

3rd. That the writ required both defendants to put in special bail, although the affidavit to hold to bail only shewed the intention to arrest her.

H. Latham, shewed cause. *Boulton*, in reply.

The affidavit held to take bail related merely to Nancy White, defendant's wife, and the process was endorsed to arrest and take bail from her only.

See 6 Moore. 497 ; 2 H. B. 17 ; 1 T. R. 486 ; Cro. Jac. 445 ; 1 Sal. 114 : Holt. 100, S. C.. ; 1 Ven ; 64, ib. 49 Anon. overruled ; 1 Mod. 8, Anon. Ca. 253 ; 6 Mod. 17 ; Stra. 1275 ; 1 Lev. 51 ; Lev. 216 ; 3 Wil. 121, 124 Anon. ; 3 B. & B. 42 ; 1 B. & A. 165 ; 5 B. & A. 747 ; 1 Taunt. 254 ; 5 T. R. 144 ; 1 East. 16 ; 6 T. R. 451 ; 1 Bing. 344 ; 1 C. & M. 54 ; 1 N. R. 54 ; 2 N. R. 380 ; 1 B. & P. 8 ; 7 East. 582 ; 7 Taunt. 55 ; Taunt. 307 ; 2 D. & R. 225.

MACAULEY, C. J.—The foregoing case seems to shew that where (as is clearly admitted in this case) the defendant is a married woman, and known to be so to the plaintiff, as shewn on the face of the affidavit to hold bail, the arrest will be set aside, with costs; and such must be the consequences here.

Then the writ of *ca. re.* not being authority at all, unless as against the wife, and being irregular as to her, seems to fail in toto. So that the husband cannot be compelled to appear to it, either for himself or both.

I am induced therefore, to think, that both the writ and arrest should be set aside.

This renders it unnecessary to notice the remaining parts; what I am not disposed to regard as well found. It is not like the case of Cozens v. Ritchie, (E. 11 Geo. IV.) but is stronger than Raymer et al. v. Hamilton (M. T. 2 Vic.), in which the arrest was held regular.

MORLAND ET AL. v. WEBSTER.

Filing return of writ of trial—Signing judgment—8 Vic. ch. 13, sec. 53—Waiver of irregularity—Estoppel.

Where the plaintiff was proceeding on the 5th of July to file the return of a writ of trial, and the defendant being about to move on that day to set aside the verdict and for a new trial, had need of the writ and return to make his motion before the judge in chambers, and the plaintiff allowed him to take them for such purpose before they were *actually* filed, to avoid the trouble of procuring a judge's order for them, (which, had they been actually filed, would have been necessary), the writ may be considered and treated as filed on that day; and, consequently, though it was not actually filed until the 8th July, and the plaintiff signed final judgment on the 12th July, the defendant was estopped from contending that the statute 8 Vic. ch. 13 sec. 53 had not been complied with—six days not having elapsed between the actual filing of the writ and signing judgment.

A writ of trial was directed to the judge of the County Court of the County of York, upon which a trial was had at the sittings in the present month of July.

On the 4th of July the defendant gave notice that he should move in chambers for an order for a rule to issue, returnable next term, to shew cause why the verdict should not be set aside and a new trial had, on the ground of misdirection, and because the verdict was contrary to law and evidence.

The plaintiff's attorney proceeded to file the return of the writ of trial on the 5th of July, and at the same time the defendant's attorney went to the office to procure the writ to take it before the judge in chambers, in order that he might make his motion. If the writ had been actually filed, the clerk in the office would not have given it to the defendant's attorney without a judge's order, and to avoid that, the plaintiff's attorney consented that the defendant's attorney should have the writ of trial and return, for the purpose of using it, before being actually filed by the clerk.

The application was made on the 5th of July by the defendant's attorney, upon the writ and return so handed him, before Mr. Justice Draper, who disposed of the matter by refusing an order on the 7th July, and the plaintiffs' attorney became on that day repossessed of the said writ of trial, and he filed it on the 8th July. On the 12th July, the plaintiffs signed final judgment and issued execution, in consequence, as he said, of finding that the defendant had

given a confession of judgment to another plaintiff. The defendant moved to set aside the judgment, as having been signed too soon, being before the expiration of six days after filing of the writ.

The plaintiffs contended—1st: That he might sign judgment as soon as the defendant's application was disposed of, notwithstanding the six days had not expired, because that time was given to enable the defendant to make an application, and having made it and failed, the plaintiffs were at liberty to proceed; and secondly: That the facts of the case justified the plaintiffs in their course.

Burns, J.—I cannot consider the question of priority of judgment in this case, on which plaintiffs should prevail, for the case as made by the defendant—who is the mover in this application—is simply one of regularity in the plaintiffs proceedings as respects the defendant and himself.

I am not prepared to express my opinion upon the first point taken by the plaintiffs, though the inclination of my mind is, that if the defendant makes an application for a new trial and fails, within the six days, yet that the plaintiff cannot proceed to sign judgment until the expiration of that time, unless, perhaps in a case where the matter was disposed of upon argument.

The question upon the facts of this case turns upon the effect to be given to the provisions of statute ch. 13 of 8 Vic. The 53rd section enacts "that at the expiration of six days next after the receipt and filing of the said writ of trial, and of the return thereof

in the Crown office, costs shall be taxed, judgment signed, and execution issued, unless either party shall apply to stay proceedings as hereinafter mentioned." This has reference to the povisions of the 55th section, which enacts, "that if either party object to any of the proceedings upon the execution of the writ of trial, and shall have given notice of intention to apply to set the same aside, within six days next after the day on which the verdict was rendered, he may make his application at any time before the entry of final judgment." In this case, the defendant did on the 4th July give the required notice, and on the 5th the application was made and the writ of trial used, as before stated.

The whole question, as it appears to me is, whether the entry of the judgment is a nullity or only an irregularity. The defendant gave his notice within the six days, and the return of the writ was also made within the six days, and it was received in the Crown office, and the only thing remaining to be done was the act of filing by the officer. That act would require to be done, undoubtedly, if the defendant stood strictly upon his rights ; but the provisions of the act require that the one party shall give the other a notice within six days after the verdict rendered, and that the other shall not sign judgment within six days after the return and filing of the writ.

It is quite competent for the parties to waive these provisions, and thus render their proceedings only irregular as against the statute ; and whenever that is the case, then the only remaining question is, whether

both parties are assenting to the irregularity, and if so, they must both be equally bound.

Now in this case the defendant made his application before the writ was filed, he taking it to the judge—the plaintiffs consenting that he might do so, to avoid the trouble of procuring an order from a judge for it.

The defendant must be held by this conduct, either to have waived the return being filed altogether, or it is to be considered that the officer should have filed the writ as of that day. The plaintiffs did what they did for the accommodation of the defendant, and I think that shuts the defendant's mouth against complaining that the statute has not been complied with.

An irregularity has been committed by both parties, in taking the writ of trial before the judge in chambers without being filed. It was competent for the parties to agree to this, and having done so, I think the writ should be considered and treated as filed on the 5th July; and upon these facts, I think it would have been competent for a judge to have ordered the writ to be filed as of that day.

The summons must therefore be discharged with costs.

Beattie v. McKay et al.

On an application to set aside a ca. sa. in the original action or proceedings against bail, the affidavits are rightly entitled in the action against the bail.

Bail are not bound to move to set aside a ca. sa. against their principal until proceedings are instituted against them.

Semble : It is not necessary that fifteen days should elapse between the teste and return of the writ of ca. sa.—eight days are sufficient.

In order to proceedings against the bail, the writ of ca. sa. must be in the hands of the sheriff to whom it is directed four days (exclusive) before the return day thereof.

In this case summons was obtained to set aside the ca. sa. against one John Robinson for irregularity, on the ground that there were not fifteen days between the teste and return of the writ, or to set aside proceedings against the bail on the ground that it did not lie in the hands of the sheriff to whom it was directed, four days before the return day thereof.

One of the defendants made oath that he was served with a writ of summons in this cause, on the 3d March—as he supposed, brought against him as bail of one John Robinson, for whom he became special bail, at the suit of the plaintiff in this cause ; that in April last (1850), the defendant's rendered John Robinson to the custody of the sheriff of Wentworth and Halton, where he remained until discharged for non-payment of the weekly allowance ; that deponent believed no notice of the render was given to the plaintiff, which was the foundation of this suit. Affidavit sworn 6th March 1851.

M. Lapenotiere, agent for defendants' attorney, swore (affidavit dated 10th March 1851,) that he searched at the office of the Deputy Clerk of the Crown for Oxford into the original proceedings in the suit brought by plaintiff against John Robinson, in which office the proceedings in that suit were carried on and the judgment entered, and found that the ca.

sa. on said judgment was issued on 12th June 1850, returnable the last day of the then term of Easter, (15th June,) and tested on 3d June, 1st day of Easter Term; that he also searched at the sheriff's office in Oxford, *wherein the venue was laid*, and found the said ca. sa. was lodged in that office on 12th June 1850, and that no other writ appeared to have been lodged in the office; that the ca. sa. was not in said sheriff's office, nor filed in the office of the Deputy Clerk of the Crown, wherefore no copy was affixed; and there was an affidavit of ineffectual search for the ca. sa. in the Crown office in Toronto.

The entitling of the affidavit was objected to on opposing the summons, and it was contended it should have been entitled in the suit against the original defendant Robinson, against whom the ca. sa. issued.

Draper, J.—In Barlow v. Kaye, 4 T. R. 688, the court held, that in an action against bail, founded on an irregular judgment, the proceedings in the original action and against the bail might be set aside on one application, but that in such case the affidavits must be entitled in the original action.

In Pocock v. Cockerton, 7 Dowl. 21, the application was to set aside the ca. sa. in the original action, and the proceedings against the bail. The affidavits were entitled in *both* causes, and the court held them sufficient. In argument it was admitted that it would have been sufficient if they had been entitled in *either*, the objection was to their being entitled in both.

The next objection was delay. The writ moved

against was returnable in Easter Term last, and if the bail were bound to move then, no doubt they are too late now.

I think they were not bound to move until the plaintiff instituted proceedings against them, and I do not suppose that an application should be entertained on *their* behalf until they were sued; and that idea strengthens my view, that the affidavits are properly entitled in the suit against them. The principal could not have moved to set aside the writ on the ground that it had not laid four days in the sheriff's office. As to him, this was no irregularity, and if he had been taken or rendered on the writ, he would have been regularly—as far as that is concerned—in custody.

The authorities are quite clear that the four days are *exclusive*, and therefore the irregularity secondly complained of—being established in fact—the defendants are entitled to succeed on that objection.—St. Car. 2, ch. 2. sec. 6, 7; 2 Salk. 602,700.

Though not necessarily called upon to decide the objection, I am however of opinion, that it is not necessary there should be fifteen days between the teste and the return of the writ of ca. sa. That was necessary in England only where the proceedings were by original writ, which writs were returnable on a *general* return day, *wheresoever*, &c., and not at a particular place, and might be tested in vacation as well as in term time. Whatever doubt may have existed before the passing of our statute 12 Vic., ch. 63, I think there is no room for any now. For in

England, since the uniformity of process act, it seems to be held that any distinction as to the ca. sa. on a suit begun by original, or by bill, is done away, and that eight days are sufficient between the teste and return.—Kymer v. Sydney, 4 M. & G. 636.

MORRIS ET AL. v. BOULTON.

Sheriff's right to poundage on executions against the person, goods and lands.—9 Vic. ch. 56, secs. 2, 3; 7 Wm. IV. ch. 3, sec. 32; 29 Eliz. ch. 4; 5 Geo. II. ch. 7; 43 Geo. III. ch. 1; 49 Geo. III. ch. 4, secs. 3, 5; 2 Geo. IV. ch. 1, sec. 19.

On writs of execution against the *person or goods* there must be a *taking*, to entitle the sheriff to poundage. If the money be paid *before* the taking, this defeats the right to poundage, but if the money be forced by the act of the sheriff, then, though it does not pass through his hands, his right to poundage accrues.

On writs against *lands*, the right to poundage only begins with *the sale*—and the words *and made*, used in the tariff, have referance to this act.

On the 18th November 1848, an execution against the defendant's lands was placed in the hands of the sheriff of the county of York, returnable the first day of Hilary Term 1850. On the 1st February 1850, three days before the return day of the writ, the plaintiff's attorney sent to the sheriff a memorandum in the following words: "Do not insert the advertisement against the defendant's lands till you hear further from the attorney." The plaintiff's attorney sent another memorandum on the 5th April 1850, stating that the sum of 1127*l.* 10*s.* had been paid on account by another person than the defendant, and

adds, "We adhere to the directions previously given the sheriff in this cause."

No advertisements were ever inserted in the Gazette or otherwise, that the lands would be sold, and the writ of execution still remained in the sheriff's hands in the same position, not withdrawn in any way, and to be acted upon still, if the plaintiffs chose to proceed.

The sheriff now made a claim to poundage, either upon the whole sum, or as might be thought he was entitled to.

On the 25th February 1851, he wrote to the attorney of the plaintiff as follows: "The sheriff's fees in this case amount to 66*l* 15*s*. 9*d*.; if not paid, I shall proceed to make the sum by a sale of lands," and the letter was handed over to the defendant as being the person more particularly interested in the matter—the execution being still pending, owing to some understanding between the parties, and the plaintiffs not pressing the sale.

The application now was on the part of the defendant to stay all further proceedings upon the writ, unless the plaintiffs direct such proceedings upon payment to the sheriff of such fees as he may by law be entitled to.

The sheriff, who is called upon in this application, has made an affidavit, in which he swore, that "during the currency of the writ the deponent seized certain lands and tenements of the defendant, situate in the city of Toronto, consisting of various lots (enumerating them), and that the deponent had been

prevented from selling the said lands by order of the plaintiff's attorney."

Burns, J.—I might have some difficulty upon technical grounds in disposing of this summons, by reason of the application being, not to rectify that which has been wrongly done by an officer of the court, but to prevent an apprehended wrong from being committed, and also by reason of the peculiar way in which the summons is worded; but the sheriff has waived these objections and discussed the matter upon its merits, and both parties are desirous of obtaining a decision as to the right of the sheriff to poundage under the circumstances.

Much of the argument on the part of the defendant was based upon the construction of 9 Vic. ch. 56, sec. 2, which repealed 7 Wm. IV. ch. 3, sec. 32, and re-enacted the clause again with a slight variation; and if this case were dependent upon this, I should abstain from giving any directions, for I look upon the statute as now applicable only to cases of double executions. I look upon this case as resting upon other and far higher considerations and principles.

I cannot help observing, that cases must arise before long, which will call for judicial decisions as to the extent of the sheriff's power in selling lands; and in order to make the grounds of the conclusion I have arrived at in this case clear to myself and unembarrassing, and that others may understand the principles which govern me, I shall be obliged to enter upon a discussion of the difference between

the different writs of execution, and the duties of the sheriff upon each.

I take it as clear, that the sheriff's right to poundage and fees is now regulated entirely by our own statutes; and the english decisions, either upon the statute 29 Eliz. ch. 4, or upon other statutes, will only serve as a guide to us in the construction to be placed upon our own. The 29 Eliz. enacted, "that it shall not be lawful for any sheriff &c., to have, receive or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person or persons whatsoever, more or other consideration or recompense than in this present act is and shall be limited and appointed, which shall be lawful to be had, received and taken —that is to say, 12*d.* of, and for every 20*s.* where the sum exceedeth not 100*l.*, and 6*d.* of and for every 20*s.* being over and above the said sum of 100*l.*, that he or they shall so levy, or extend and deliver in execution, or take the body in execution for, by virtue, &c.

It must be borne in mind, that lands in England were not sold as in this country, but were extended under the writ of elegit; and it was, and is upon the annual value of the lands extended, and not on the sum indorsed, that the sheriff is entitled to poundage.

It would seem the practice under 5 Geo. II. ch. 7 was to embody the execution against goods and lands in one writ, but our statute of 1803, 44 Geo. III. ch. 1, abolished that practice, and enacted that goods and

chattels and lands and tenements, shall not be included in the same writ of execution, nor shall any such process issue against the lands and tenements until the return of the process against the goods and chattels.

The second section of the act is in these words: "That the writ against the lands and tenements shall not be made returnable in less than twelve months from the teste thereof, nor shall the sheriff expose the same to sale within less than twelve months from the day on which the writ shall have been delivered to him.

Whether the provisions of the statute of Elizabeth respecting poundage had been followed upon writs of execution where the same were either against goods and lands jointly, or where separate, or whether poundage fees were regulated by any ordinances which might have been in force, I am unable to say; but the first statute we had on the subject was in 1809, the 49 Geo. III. ch. 4, sec. 3. That statute was confined to poundage on executions against goods, and from the way it is worded, when read with the statute of Elizabeth, and our own subsequent statutes, it would seem as though the Legislature at that day did not contemplate the statute of Elizabeth being in force—for the right to levy poundage is not given to the sheriff, but to the plaintiff in the suit, where he shall be entitled to levy under an execution. This would seem to suppose the sheriff obliged as at common law, to execute the King's writs without fee or reward, or that a plaintiff was obliged to compensate

the sheriff, and that to reimburse himself he might levy poundage where he was entitled to any under execution.

The 5th section of 49 Geo. III. ch. 4, deserves attention, and the words are these: "That no sheriff or other officer in any district of this province, shall proceed to the sale of any effects taken by virtue of any writ of execution, until public notice in writing thereof is given at least eight days previous thereto, at the most public place in the town or township where such effects may have been taken in execution, and of the time and place where such effects are to be exposed to sale." Without intending to express any opinion as to the effect of the words in 5th Geo. II. ch. 7, that houses, lands, negroes and other hereditaments, and real estates are to be subject to the satisfaction of debts, duties and demands, and in like manner as personal estates are seized, extended, sold or disposed of for the satisfaction of debts, it appears to me that the Legislature in this country by the language in the statute of 1803, as respects lands, and by the language of the statute of 1809, respecting goods and chattels, contemplated the duty of the sheriff to be very different upon the different writs. In the one case he was prohibited from selling until the expiration of twelve months from the delivery of the writ to him, and in the other, from selling in less than eight days after the taking the goods.

These are the different statutes before 1822, and whether the sheriff before then received poundage on

executions against lands, I do not know. The 2d Geo. IV. ch· 1, sec. 19, authorizes the sheriff to levy the poundage fees, and the expense of the execution in any execution against the person, lands or goods of any debtor or debtors, and the 45th section gave the court power to regulate the fees to be taken by the sheriff in respect of any business to be done or transacted.

Under this authority the tariff of fees regulated the poundage, and in doing so the words used, and which have been continued in all subsequent tariffs, are these: "poundage on executions where the sum levied and made, &c." The words *and made*, are superadded to the expression as used in the statute of Elizabeth, but not to the words of our statute of 1822, for that authorizes the sheriff to levy the poundage fees over and above the sum recovered by the judgment, and it only remained for the court to say what those fees should be, and the court has said it should be where the sum was levied and made; and the question now is, as to the application of the term *and made* with reference to the duty which the legislature regulated in regard to the different writs, and what the court meant by the expression.

We always find the duty of the sheriff, when spoken of in regard to the process against goods, as contemplating a *taking* of them by the sheriff, and when the sheriff has taken them, the defendant is discharged from the whole debt, or to the extent of the value, or for what they sell for by the sheriff.

The *taking* is a seizure and vests the property

quoad the execution in the sheriff; and therefore, according to Alchin v. Wells, 5 T. R. 540, the sheriff is entitled to his poundage where he has made a levy, and is so also, where, after a levy has been made, the execution and judgment are set aside for irregularity. Rawsthorne v. Wilkinson, 4 M. & S. 256, and see Miller v. Parnell, 2 Mar. 78.

We seem to have gone further and added the words *and made*, and therefore it may be asked, whether in a case of compromise between the parties after the sheriff has once made a levy without the money going through the sheriff's hands, he is not defeated of his poundage fees? I am of opinion he is not. According to Chapman v. Bowlby, 8 M. & W. 249, it is immaterial whether after levy the money is paid to the plaintiff by the defendant directly or indirectly through the sheriff; it is considered as the consequence of his taking the goods, and according to or Bell v. Hutchinson, 2 Dowl. & L. 43, 8 Jur. 895, if the money be paid upon the execution to the sheriff before any taking of the goods happen, the sheriff is not entitled to poundage.

I take these decisions to establish this principle, that it is not the writ alone placed in the sheriff's hands, which entitles him to poundage, but that it is the levy under the writ—that is the seizing and taking of the goods. I further take them as establishing this also, the words *and made* should be interpreted as meaning that if the money be forced or produced by, or as the consequence of the sheriff seizing and taking the goods, it is of no consequence whether it

goes through the hands of the sheriff or not—it is made by his act. I think the 3d clause of 9 Vic. ch. 56 supports this view; for in the case of goods, the sheriff's poundage is limited to the value of the property actually seized, unless where he collects the full amount endorsed.

In executions against the person, it is not necessary that the money should be paid before the sheriff is entitled to his poundage—the taking of the person is a satisfaction, of the execution; and in this case, the words *and made*, refer to that which produces satisfaction, and it is the taking of the person which does that.

The statute of 1822 limits poundage to executions against the person, goods and lands. I have stated what I think gives the sheriff a right to poundage upon two species of executions, and how the words *and made* are to be interpreted in those cases, and it only remains to apply them to the case of execution against lands. It seems to have been first agitated, so far as I can learn, in the motion which was made in Gates et al. v. Crooks, U. C. Rep., O. S. 286, but no opinion was given upon the summary application.

I should now take the same course but for the case of Leeming et. al. v. Hagerman, Man. Rep., Hil. 6 Wm. IV., which grew out of the case of Gates v. Crooks. I quite agree with the decision in Leeming v. Hagerman, and I take it to establish this principle, that in every case on executions against lands, where no sale takes place, the sheriff is not entitled to poundage.

It may be thought that I am stating the principles of the case too broadly, but I think not. The case disclosed a state of facts nearly similar to the present; that the sheriff had done nothing upon the writ, and not having shewn himself to have performed any work or labor, he was not entitled to any fees.

If a sheriff advertizes, he may be entitled to some fees for work in doing so, and would be for his disbursements undoubtedly where no sale takes place. The only difference in the case before me and the other case is, that here the sheriff has sworn he made a seizure—he does not say what act he did which constituted the seizure; and as we very well know, that in the case of lands there is no taking like in the cases of executions against goods and against the person. The question is, when does the sheriff become entitled to poundage fees?

In the tariff of fees there is provision for payment of travelling fees and for disbursements incurred, and whenever the sheriff incurs these, then he has performed work and labor upon the writ, and would be entitled to such fees. Poundage however is a distinct matter, and as stated in the judgment in Leeming v. Hagerman, it is not the placing of the writ in the sheriff's hands which would entitle him to poundage, and that principle is clearly established in the case of goods by the authorities I have already mentioned.

I have already said that I think the Legislature contemplated the position of the sheriff to be very different when executing the writ against lands and

when executing it against goods, and if the sheriff must, according to Leeming v. Hagerman, shew that he has done some work before he can recover fees. I do not see how he can in the case of lands shew himself entitled to poundage, short of selling them. His work is then only done which entitles him to be paid. Unless this be so, it seems to me utterly impossible to fix a time from which it is to be dated the sheriff is entitled to his fees. I therefore interpret the tariff in cases of lands to mean the sale. I refer also to the sheriff's duty in advertising lands as provided for by section 20 of the statute of 1822.

Shortly then, to recapitulate the grounds of my opinion, which are these:—

1st. Upon writs of execution against the person or goods, there must be a *taking* to entitle the sheriff to poundage; that if the money be paid before the taking, either to the plaintiff or the sheriff, the right to poundage does not attach; that the meaning of the tariff in these cases is, that the sheriff's right to poundage begins with his *taking* the person or goods, and the words *and made* are to be interpreted in favor of the sheriff, whether the money go through his hands or not, if it be forced as the consequence of his act.

2nd. Upon writs of execution against lands, as there is no taking by the sheriff, no act done by him which can vest any property in him, and nothing which he can do to deprive the defendant of the lands before sale, his right to poundage must begin with the sale, and the words *and made* must refer to this act.

3rd. If this be not the true distinction between the different writs of execution, and the time when the sheriff is entitled to poundage, then in case of writs against lands it is impossible to answer when the right of the sheriff to poundage begins, and a payment after a writ against lands in the sheriff's office might be treated and dealt with wholly different from what it would be in the case of payment when the execution is against goods.

Upon this opinion the parties can arrange, I suppose, without further difficulty, what fees should be paid, and the case need not call for further discussion or interference by me between them.

RICHARESON V. RANNEY ET AL.

Writ and declaration entitled and filed in different courts—Irregularity—Nullity—22nd rule of court, H. T. 13 Vic.

The writ and appearance were entitled in the *Common Pleas ;* the declaration served and filed was entitled in the *Queen's Bench.* Pleas were *filed* entitled also tn Queen's Bench ; but defendant's attorney discovering the mistake made in entitling the declaration, served no *copies* of pleas on plaintiff's attorney, but signed judgments of *non pros.* for want of a declaration : *Held*, per Draper, J., that the declaration must be treated as a nullity ; but judgment of *non pros.* was set aside on the merits, on payment of costs.

Semble—that if the declaration had been filed in the proper office, though entitled wrongly, and the defendant had pleaded, filing his plea in the same office, such would be merely an irregularity, and cured by pleading by rule 22, Hil. 13 Vic.

Replevin—The writ was sued out from the deputy's office in the county of Hastings, in the Court of Common Pleas, on the 19th September, 1851, to which the defendants appeared by attorney. On

the 27th December, a demand of declaration was served on the plaintiff's attorney; and on the 5th of January, 1852, a declaration was filed "in the office of the deputy clerk of the crown in the County of Hastings, entitled in the Queen's Bench, by mistake," and a copy and demand of plea, &c., were served.

On the 9th of January pleas similarly entitled were filed in the said office of the deputy clerk of the crown; and on the 10th of January, judgment of *non pros.* was signed for want of a declaration—treating the one filed as a nullity.

The defendant's attorney discovered the error of entitling the declaration in the Queen's Bench, almost immediately after he had filed his pleas, and did not serve copies on the plaintiff's attorney; but "searched in the office of the said deputy clerk of the crown *in this honorable court*"—*i. e.* the Court of Common Pleas—and finding no declaration, signed judgment of *non pros.* and issued execution for the costs.

The plaintiff then took out a summons to set aside this judgment for irregularity, or on the merits, filing affidavits. The irregularity in the judgment pointed out, was the signing judgment after a declaration was in fact filed and pleaded to.

It was contended—1st, that the entitling the declaration in the wrong court did not make it a nullity; that at most, an application might have been made to set it aside; and 2nd, that by pleading, the defendant had waived the irregularity, and could not after-

wards sign judgment as for want of a declaration—4 Dowl. 290.

On the other side it was insisted the declaration was a nullity, and Munden v. the Duke of Brunswick, 4 C. B. 319, was cited; and, as to merits, the defendant put in affidavits of the particular circumstances of the case to rebut the general allegation in the affidavits filed for the plaintiff.

Draper, J.—My first impression of this case was that it involved no other question than the mere entitling of the declaration "*in the Queen's Beuch*" instead of "*in the Common Pleas.*" But on reading the affidavits it appears more is involved, though not so distinctly brought out as at once to present the objection, which (if anything can) alone can uphold the judgment of *non pros.* as regular. That objection is, that no declaration has been filed at all in this cause in the office of the court of Common Pleas. Suppose the writ had been here at Toronto, the writ and appearance being in that court, filed in the proper office. If the plaintiff declared, and filed his declaration in the same office, but by mistake entitled it "in the Queen's Bench," and served the copy, to which the defendant pleaded, filing his plea in the same office, I should think it merely an irregularity, and that by pleading it was cured—See rule No. 22 Hilary, 13 Vic.

But if the declaration entitled "in the Queen's Bench," were filed in the office of that court, and pleas similarly entitled were filed also; a very different question presents itself. Two enquiries

arise. 1st. Is what has been done precisely similar to the case last supposed? 2nd. If it be what is the consequence?

As to the first: The stat. 12 Vic. ch. 63, establishes two distinct principal offices for each court. It provides that the same individual shall, in each county or union of counties, be deputy clerk of the Crown and pleas for both counties. The 12th sec. apparently treats the offices as separated, though held by the same individual; for it enacts in what manner "the Clerk of the Crown and pleas, shall perform their duties. Each officer in his several station, as clerk, or deputy clerk, in the one court, is to perform the like duties as are required in the *same station* in the other court. The salary is one, no fees being allowed; and in the sec. (13) providing it, the the Deputy clerk of the Crown is named as an individual officer. The 15th section provides, that the clerk of the Crown and pleas, in each of the said courts, shall render quarterly accounts to the Inspector General of the province, which shall be signed by the officer rendering the same, and shall be declared before one of the judges of the court to which he belongs," (to be just and true, I suppose, though the act does not say so), and the monies paid over within ten days to the Receiver General; and the 16th section provides for the rendering similar accounts by the clerks of the county courts, who are ex officio (sec.) the deputy clerks of the Crown and pleas for each of the courts; which accounts shall be signed by the officer rendering the same, and shall

be declared before the judge of the county court to which he belongs, and the monies paid over as by the principal officer. No direct provision is made for separate accounts of the fees, &c., of the two courts being kept by the deputy clerks; though probably under the 15th section the Inspector General has authority to direct it, and there may be good reasons for requiring it to be done. No rule of court regulates the duty of the deputy clerk of one court as distinct from that of the other, or prescribe the keeping the files of the two courts separately, nor for keeping separate books for entering appearances, interlocutory judgment, &c., and such as are kept in the two principal offices. I presume, however, that as the two offices are treated by the statute as distinct, though filled by the same person, the business of each is treated and conducted as distinct also. There is as much reason for this as for keeping the files of the superior courts distinct from the files of the county court; notwithstanding that the clerk of the county court is, by the statute, made ex officio the deputy clerk in his county for each of the superior courts.

Treating the two offices as held and kept by the deputy as distinct from each other, and looking on the case in the same light as if the declaration was not simply wrong on its title, but was filed in the wrong office, I feel constrained to treat it as a nullity. The case might have been made clearer if the officer in filing the declaration had marked it in a manner to shew whether he was acting as

deputy clerk of the Crown and pleas of the Queen's Bench or of the Common Pleas, as by adding initial letters, after marking the paper filed, in indication of the court in which he was acting; and perhaps he has done so though it does not appear. If he has simply signed his name, it must be assumed he was acting as officer of that court in which the paper was entitled; and I assume he did so here, and therefore that the declaration intended for a cause in the Court of Common Pleas was entitled and filed in the Court of Queen's Bench, which I think is a nullity.

Then, as to merits: I think the plaintiff should be relieved on payment of costs; his affidavit is sufficient, and I cannot try the cause on the facts stated in the defendant's affidavits in answer.

The judgment of *non pros.* will therefore be set aside on the payment of costs. Costs to be taxed and paid within fourteen days from the date of the order, and a declaration filed in the proper office within twenty-four hours after the costs are paid.

Non pros.—set aside.

WADSWORTH ET AL. v. W. H. BOULTON.

Arrest—Privilege of Parliament.—1 *Geo.* III. *ch.* 1, *sec.* 3; 2 *Geo.* IV. *ch.* 1, *sec.* 6; 1 *Vic. ch.* 63, *see.* 33; 13 & 14 *Vic. ch.* 53, *sec.* 96.

A member of the Provincial Parliamant is privileged from arrest for a period of forty days after the prorogation or dissolution of parliament, and for the same period before the next appointed meeting.

Defendant made an application to set aside an arrest for irregularity; his application was defeated, not on the merits but owing to the plaintiff s applying for and obtaining an order to amend.

Held, therefore, that plaintiff was still at liberty to move after the amendment against the arrest on the ground of illegality.

The first application on the part of the defendant was made before Mr. Justice Draper in chambers, on the 28th November, to set aside the *ca sa.* on which the defendant had been on that day arrested; and the arrest of the defendant thereon, and all subsequent proceedings, for irregularity, on various grounds therein stated; and on the return of that summons it was enlarged till the 1st December, and then further enlarged till the 2nd December, before Chief Justice Macaulay.

On the 1st December the plaintiff's counsel applied for and obtained a summons calling on the defendant to shew cause on the following day why the proceedings objected to as irregular by the defendant should not be amended. And it was ordered that the argument of that summons, and the summons granted on the 28th, should come on together.

On the 5th December the learned Chief Justice of the Common Pleas, after hearing the parties, made an order that the plaintiff be at liberty to amend the declaration, pleas, replications, nisi prius record, and judgment roll, by the writ of summons, on payment of the costs of the application to amend made by the plaintiff; and also the costs of an application and summons made and obtained on behalf of the defendant to set aside the *capias ad satisfaciendum*, &c.,

issued in this cause, and that upon payment thereof the said last mentioned summons be discharged.

The objections to the regularity of the plaintiff's proceedings, on which alone the defendant rested his application at that time to be discharged, being removed by the order to amend at the costs of the plaintiff, the defendant on the following day obtained a summons calling on the plaintiff to shew cause on the Monday then next why the writ of *capias ad satisfaciendum* issued in this cause, and the arrest of the defendant thereunder, and all subsequent proceedings, or the arrest of the defendant and all subsequent proceedings thereon should not be set aside or discharged, on the ground that the defendant was at the time of his arrest privileged from such arrest, he having been a member of the late parliament of Canada, which was alleged to have been only dissolved on the 6th day of November last; and that the defendant was privileged from arrest for a longer period than had elapsed between the time of such alleged dissolution and the time of his arrest, upon the facts and grounds disclosed in the affidavit and papers filed.

At the return of this summons *Dr. Connor* took a preliminary objection, that this application ought not now to be received, on the grounds that a former motion to set aside the arrest of the defendant for irregularity in the proceedings had been discharged, and that the grounds of objection now urged for setting aside the said arrest being in existence and known to the defendant at that time ought then to

have been urged, and that it was not competent for the defendant after being defeated in one application to make a second application for the same object on grounds which were known at the time of such former application.

McLean, J.—The object of the first application made by the defendant and of this application is undoubtedly the same, the setting aside of the arrest; in the former case for irregularity in the proceedings, in this case for the illegality of the arrest, on the ground that the defendant having been a member of the Legislative Assembly of Canada was privileged from arrest after the dissolution of the Assembly for a longer period than had intervened between such dissolution and the time of the arrest; this latter ground might undoubtedly have been urged by the defendant at the time the motion was made for irregularity, and if that motion had been discharged upon the merits, I should have some difficulty in deciding that the defendant could keep back certain objections which were known to him, and then make this second application on such reserved objections. But the defendant's objections to the regularity of the proceedings were met, not on the merits, but by an application on the part of the plaintiff to remove such causes of objection by amending their proceedings on payment of costs, and it was solely owing to this motion of the plaintiff that the defendant's application was defeated, and not because it was unfounded, as it originally stood. By the amendment there is now a judgment in the cause on which the *ca. sa.* is

founded, which was not previously the case, and the plaintiff now claims to be discharged from arrest under that judgment and *ca. sa.* on the ground that his arrest was illegal.

The proceedings being rectified, and the *ca. sa.* corresponding with such proceedings, the position of the defendant is changed on the application of the plaintiffs, and at their costs; and it does not appear to me reasonable that the plaintiff should now be at liberty to say, that because they have amended their proceedings the defendant cannot object to the legality of his arrest, on grounds wholly different from those involved in the former application.

There are many cases which shew that where an application has been discharged from defective affidavits or other causes, a party will not be allowed upon other grounds or additional affidavits, to renew his application; and I feel the difficulty in this case of entering another motion for the same object, *the discharge from arrest*, which was sought on the former occasion to be accomplished on other grounds; but this case differs from the ordinary class of cases where a motion has been discharged on the merits, or on the grounds of not being properly supported by affidavits: and as the summons now pending was granted by Mr. Chief Justice Macaulay, who had made the order to amend on the former proceedings, I must, I think, assume that in making that order and granting this summons, he intended the defendant should be at liberty to move against his arrest on the ground of its illegality.

7 T. R. 455 ; 1 E. 537 ; 13 M. & W. 558 2 Dow. N. S. 932 ; 1 P. & D. 164 ; S. C. 8 A. & E. 413 ; 6 Scotts. N. R. 165 ; 8 Dow. 323-652 ; 1 Dow. N. S. 792.

The privilege claimed and enjoyed by members of the Imperial Parliament to be free from arrest during the sitting of parliament and for a reasonable period before and after the sitting, is recognized by the courts of law as a strict legal right, against an infringement of which relief will be afforded. No definite period was established by any decision as a reasonable period till the case reported in Goudie v. Duncombe. 1st Exche. 430, when it was held that the privilege of a member of parliament from arrest on a *ca. sa.* exists for forty days before, and forty days after a meeting of parliament, and the rule of privilege is the in all cases of dissolution or of prorogation.

Before this decision arrests had been set aside on the ground that a reasonable period had not intervened between a prorogation and dissolution and the time of arrest. This case procceeds upon the ground that the House of Commons has always claimed for its members freedom from arrest while attending parliament ; and as parliament is only prorogued forty days at a time, it follows that its members must be altogether free from arrest in civil coses, inasmuch as they are called from time to time, at the expiration of each period of forty days to attend their duties in parliament, and are entitled to avail themselves of

the time, which has been declared a reasonable period for their attendance.

The case of Butcher v. Stewart, 11 M. & W. 856, or rather the facts appearing in the case, (for the case itself did not turn on any privilege) shews that members are entitled to the same extent of privilege from arrest in case of a dissolution as after a prorogation of porliament.

In that case it appears that parliament had been dissolved thirty days before the arrest, and a Mr. Robert Stewart, who had been a member of parliament was arrested and imprisoned. He applied on the 23rd July for his discharge on the ground of his privilege, and on hearing the attorneys or agents on both sides the learned Judge Patterson ordered that the defendant "should be discharged out of the custody of the sheriff of Middlesex as to that action, *and all detainers, the said defendant being privileged from arrest.*

In the particular case of Butcher against Robert Stewart the dischyrge was not opposed on the part of the plaintiff, in in consequence of an arrangement previously entered into, which was agreed should not be prejudiced by the application, but the detainers which were lodged subsequent to the *ca. sa.* of Butcher, were all discharged on the ground of the defendant being privileged from arrest, though a period of thirty days had elapsed after the dissolution of the parliament, which was strongly urged to be a reasonable period to admit of the defendant's return to his own residence before the arrest.

Whether the term of forty days is more or less than a reasonable period to enable members to go to the place of meeting of parliament, or to return from thence, cannot now be questioned; it appears to be established, not for the benefit of individuals, but for the advantage of the public, that those persons who have been elected members shall be free to attend to the duties which they have been chosen to perform, and that after having so attended, they shall be at liberty at any time within forty days to return to their homes, unmolested by any legal process intended to enforce the payment of debts by the imprisonment of the person.

But, admitting that members of the British Parliament are in truth free from arrest in civil cases, it is contended that the members of the provincial legislature, a body constituted by an act of the imperial parliament, and with powers limited by the very act under which they hold their sittings, are not entitled to claim any exemption from imprisonment, or any privileges beyond what may be necessary to enable them to perform their legislative duties.

It is conceded that the provincial legislature must necessarily be invested with sufficient power to protect itself and its members against insult, while assembled for legislative purposes: that parties may be compelled to attend to give evidence relative to any matters pending; and that, in short, the necessary power and authority must be vested in the two branches of the provincial legislature, to enable them to carry out their public functions; but it is con-

tended that they do not enjoy any power, and that their members enjoy no privileges beyond what may be necessary in this respect.

Now, if it is essential to the public interests that the several members should be at liberty, when called upon to attend to their legislative duties, and that these duties must be regarded as paramount to private or individual interests, as they are undoubtedly considered in England, it follows, as it appears to me, that a member cannot be restrained at the instance of any individual from attendance upon these duties.

Then, if a member were liable to be arrested on a *ca. sa.*, and committed to jail, he would, on the ground of necessity, be entitled to be discharged from custody for the purpose of enabling him to attend his legislative duties; and what would form a reasonable period for such attendance, and for returning from them, would become a matter of question, depending upon the distance to be travelled, and the facilities of travelling in each case.

But the necessity for the attendance of members, in order to discharge their legislative duties, is not less important in this province than in England; though the interests involved in the legislation of this province and of the United Kingdom bear but slender proportion to each other; and if it has been deemed essential in England to guard against an infringement of public right, by the protection from arrest of an individual holding the responsible position of a representative in the legislature of his country, I do not see that it is less important or essential in this province.

But then it is alleged that the privilege in England has become established as a part of the common law, and the law of parliament, and that it is not, and cannot be, so established in this province. That is undoubtedly true, but by the very first act which stands upon the statute book of this portion of the province—51 Geo. III. ch. 1, sec. 3—it is declared, that from and after the passing of that act, in all matters of controversy relative to property and *civil rights*, resort shall be had to the laws of England *as the rule* for the decision of the same.

Is this then a civil right? And if so, what was the law of England in 1792? which must be taken as the rule for its decision. That it is a question involving a civil right, I apprehend, will not be denied, and that the same privilege of exemption from arrest was claimed by members of the British parliament in 1792 will also be admitted, and the decisions since have only tended to confirm what the common law at that time was.

In the deciding case I am bound by these decisions, made in cases involving the same civil right in England; and on this head alone I should feel bound to give effect to this application. But the privileges claimed to be exercised by our provincial legislature, and the privilege claimed by members, have been recognized in so many cases by our courts and judges, that I am not left without ample authority to support this view of the case. Besides which our provincial statutes, 2 Geo. IV. ch. 1 sec. 6; 12 Vic. ch. 63 sec. 22 & 33; and 13 & 14 Vic. ch.

55 sec. 96; expressly and in terms recognized the privilege of parliament.—McNab v. Bidwell; Mahon v. Ermatinger; Phelps v. McKenzie; Hill v. McNab, et al.; In re Wood, M. P.

In the act 2 Geo. IV. ch. 1 the 6th section enacts, that for and notwithstanding anything in this act contained, it shall and may be lawful to proceed by bill, in any case where by reason of any *privilege* such *proceeding is practised* in the Court of Queen's Bench in England. Under this provision of the statute members of our provincial legislature have always been entitled to be sued by bill and summons because such proceeding was practised in the Court of Queen's Bench in England, in suits against members of parliament.

By the 12th Vic. ch. 63 sec. 22, that privilege is taken away in Upper Canada; that section enacts that the process in all actions commenced in the Courts of Queen's Bench and Common Pleas, in cases where it is not intended to hold the defendant to special bail, shall, whether the action be brought by or against *any person entitled to the privilege of parliament* or of the court wherein such action shall be brought, or of any other court, or to any other privilege, or by or against any other person, be according to the form annexed marked No. 1, which process may issue from either of the said courts, and shall be called a writ of summons, &c.

The 23rd section of this act provides, "That nothing in that act contained shall subject any person to arrest, *who by reason of any privilege, usage*, or otherwise, may now by law be *exempt therefrom*."

The 13 & 14 Vic. ch. 55 sec. 96, enacts that nothing therein contained shall extend to alter, abridge or affect any power or authority which any court or judge now hath, or any practice or form in regard to trials by jury, jury process, juries or jurors; except in those cases only where any such power or authority, practice or form, is repealed by this act, or is, or shall be, inconsistent with any of the provisions thereof; nor to *change* or *alter any privilege of parliament*—13 & 14 Vic. ch. 53 sec. 28. The Division Court Act: that no *privilege* of any description whatever shall be allowed to any person to exempt him from suing, and being sued in the Division Courts, upon any cause of action, within the jurisdiction of the said courts.

With these enactments before me, and the decisions of our own courts and judges to guide me, as to the question of provincial parliamentary privilege, I do not feel at liberty to hold that parliament, or the Legislative Assembly, and the Legislative Council, or the members of either, are entitled to certain privileges, but not entitled to others.

Under all the circumstances of this case, and after a great deal of consideration, I am obliged to decide that the defendant was entitled, as a member of the late parliament, to privilege from arrest for a longer period than had intervened between the dissolution of that parliament and his arrest; and that the arrest having been improperly made must be set aside, and all proceedings had in consequence of it.

Per Cur.—Arrest set aside.

The Queen ex rel. Hesvey, the younger, v. Scott.

Qualification necessary for Town Councillor of Bytown at an election held in January 1851—10 *&* 11 *Vic., ch.* 43—12 *Vic. chs.* 80, 81—13 *&* 14 *Vic. ch.* 64, *sec.* 17, *ch.* 67, *ch.* 83. *Relator's statement, how treated—Course when voters had no notice of objection to candidate for whom they voted—*59 *Geo. III. ch.* 7.

The qualification necessary for a Town Councillor for Bytown, at an election held in January, 1851, is that set forth in 5th sec. of 10 & 11 Vic. ch. 43. He must be an inhabitant householder.

A relator's statement, supported by his affidavit, is looked upon as a material traversable allegation in a declaration; and if defendant omit to answer it, he must be taken to admit that it is true.

Where it does not appear that the voters at an election had notice of any objection to the candidate for whom they voted (though a valid one exists), a new election will be granted; but the relator, though next in order to him, will not be declared entitled in the office.

The summons in this case issued on the 17th of February, 1851, and service was acknowledged and accepted on 12th March. The relator's statement complained of the undue election of defendant as councillor for the east ward of the town of Bytown, declaring relator's interest as a candidate, and that relator should have been returned duly elected.

The objections stated were:

1. That defendant was not duly qualified, not being possessed of freehold property within the town of the assessed value of 300*l.*; and not having built a dwelling-house on leasehold property in the town, and resided thereon, which would *bona fide* rent for 30*l.* per annum; and not being the proprietor of a dwelling house or other building erected on leasehold

property in the town, rented, or which would rent for 30*l.* per annum; that defendant had not at the time of the election, or on entering on the office, any such estate as would qualify him under 10 & 11 Vic. ch. 43, sec. 5.

2. That defendant was not an inhabitant householder of the town, and did not occupy a dwelling-house therein; and was not at the time of his election or entering on the office an inhabitant householder.

3. That the returning officer received votes for defendant from all persons whose names appeared on the collector's roll for the ward, without other qualification as required by 10 & 11 Vic. ch. 43, sec. 6, though such receiving of votes was objected to and protested against.

Affidavit of relator—sworn 11th February 1851—that he believed the objections were well founded in fact.

Affidavit of relator—sworn 11th February 1851—that defendant exercised the office under pretence of an election held at Bytown on 6th and 7th January 1851, and took the oaths of office and qualification on 20th January (copy of the oath of qualification annexed); that no other oath of qualification was taken; that defendant was not at the time of election or assuming office possessed of freehold property in the town of Bytown of the assessed value of 300*l.*; nor has he built a dwelling-house on leasehold property in the town and resided thereon which would *bona fide* rent for 30*l.* per annum; nor is he the proprietor of a dwelling-house or other buildings erected

on leasehold property in the town, rented, or which would rent for 30*l.* per annum; that defendant was not at the time of the election or assuming office an inhabitant householder of the town of Bytown; that the returning officer received votes for defendant from all persons whose names were on the collector's roll of the east ward of Bytown, without any other qualification—which proceeding was protested against during the election by the relator.

Copy of defendant's oath of qualification, sworn 20th January 1851: that he was *bona fide* seized to his own use and benefit of an estate in fee simple in certain property in the town of Bytown, known as lots Nos. 21, 25, 26 & 27 on the south side of Besserer Street, of the real value of 100*l.* currency over and above all charges and incumbrances, "by virtue of which, in so far as it is consistent with the requirements of law, I qualify myself" to act as councillor for the town.

On the 20th March 1851, *Helliwell* appeared for the defendant; he objected:

1. That the relator did not shew that in fact he was a candidate.

2. That if in fact a candidate, he did not shew himself lawfully qualified.

3. That the defendant was not bound by law to take any oath of qualification.

4. If it was necessary, then the oath of qualification taken was sufficient.

5. That in the existing state of the law, as respects Bytown, no other qualification than that of being a

subject by birth or naturalization, and being 21 years of age, is necessary.

6. That under any circumstance there can only be a new election, for defendant had a large majority who had not any notice they were voting for an unqualified person; and the relator was himself disqualified.

He filed on the defence:

1. Affidavit of defendant—which, it is apprehended, could not be read. It was however of little importance—going to negative relator's having any real estate, and identifying an annexed certificate of the clerk of the county court, that on 14th January, 1851, the renewal of a mortgage of all the goods, chattels, and household furniture of relator, in Bytown, to D. B. O. Ford, for 250*l*.

2. Certificate of the town clerk of Bytown under corporate seal, that the town was assessed for the year 1850 by the county of Carleton, under 59 Geo. III. ch. 7; that on the assessment roll the relator was rated for 63*l*. and no more; that by the return of the elections for the east ward, held 6th and 7th January, 1851, the votes were—Scott, 137; Bell, 138; Laporte, 135; Hervey, 59—and the three first were declared duly elected; that at the election of councillors for Bytown in 1850 and 1851, every person on the assessment roll was allowed to vote.

Draper, J.—The really important questions arising in this case are—first, what was the legal qualification of a candidate for the office of councillor for the town of Bytown at the election in January last; and second,

what was the qualification of a voter at the same election.

The town of Bytown was incorporated by 10 & 11 Vic. ch. 43—passed 28th July, 1847. The council was to consist of seven members, to be elected from among the inhabitant householders of the town—subjects of Her Majesty, of the age of 21 years; freeholders therein to the assessed value of 300*l.*; or persons who have built a dwelling-house on leasehold property, and are resident therein, which would *bona fide* rent for 30*l.* per annum; or proprietors of a dwelling-house or other buildings erected on leasehold property, rented, or which would rent for 30*l.* per annum, and resident at the time of the election. And by sec. 6 the electors are to be the male freeholders and inhabitant householders, 21 years old, within their respective wards, subjects of her Majesty, possessed of freehold estate within any of the wards of the assessed value of 30*l.*; or tenants *rated upon the assessment roll* of the town, and who shall have paid six months' rent before the elections for their dwelling-house, within the ward, at the rate of 10*l.* currency per annum; or leaseholders who have built a dwelling-house on such leasehold, which would *bona fide* rent for 10*l.* per annum. The 20th section provides that lands shall be assessed at their real value.

A proclamation, dated 12th October, 1849, announced that the foregoing act having been transmitted and received on the 30th September, 1847, was, by order of her Majesty in council, disallowed on the

18th July, 1849, and within two years after its being received. By virtue of the act of Union, 3 & 4 Vic. ch. 35, sec. 38, this act incorporating Bytown became void and annulled from the 12th October, 1849.

Before this disallowance was promulgated, and before the date of the order of her Majesty in council, the statute 12 Vic. ch. 80 was passed (on 30th May, 1849), by which the act 18 & 11 Vic. ch. 43 was wholly repealed. The second section of this repealing act was passed that no doubt may remain whether any part of former acts relative to the incorporation of the several districts and other localities, or the election and duties of township officers, remain in force—referring to the schedules A. & B. to shew what is repealed and what is saved, and no part of this act is saved. But the third section provides—notwithstanding any expression in schedule A. shewing any act (as is the case with this act) wholly repealed—that till a new assessment law be passed, so much of the acts mentioned in schedules A. & B. as provides for assessments in any cities, towns or villages, or any matter relating to the same, shall continue in force. The repealing act, ch. 80, was not to take effect however (sec. 4) until 1st January, 1850.

The 12th Vic. ch. 81, makes new provisions as to the qualification of candidates and voters, but the 208th section postpones their coming into force until a new assessment law be passed, and provides that in the meantime "all such persons as have heretofore had the right to vote or be elected respectively

at the annual township elections for district councillors for the several townships in Upper Canada shall have the right of voting and being elected for the township and village councillors to be elected under this act; and such persons as have heretofore had a right to vote or be elected at the municipal elections of any city, town or village heretofore incorporated, or having a board of police by law established for the same, shall have the right of voting and being elected for the city, town or village; aldermen and councillors to be elected under this act for such city, town or village, respectively; and the persons entitled to vote or be elected at the municipal elections of every town and village *not incorporated before* the passing of this act shall be the resident male inhabitants, being either householders or freeholders of such town or village, of the age of 21 years or upwards," subjects of her Majesty by birth or naturalization, who have resided within such town or village six months before the election, and have been rated on the assessment roll of such town or village as householders or freeholders for the year previous. And this 208th section further provides, that the qualification of a township councillor shall be 100*l.*, instead of 300*l.* assessed value of real property, or of 200*l.* of real and personal property together; and that as to towns and villages lastly above mentioned—*i. e.* those not incorporated before the passing of the act—the qualification shall be, for a councillor, to be seized in fee of lands, &c., in the county or union of counties in which the town or village is situate, or within

some one or other of the counties or unions of counties next adjoining such first mentioned county or union of counties, of the value of 100*l.*; and that any town, *the act of incorporation of which had been disallowed* or had expired *before the* 1*st January* 1850, shall be deemed an incorporated town within this section. The 61st section of the same act enacts, that the inhabitants of each of the towns mentioned in schedule B., intituled "*towns,*" shall severally be a body corporate, with the same corporate powers as the inhabitants of villages incorporated under this act, except in so far as such powers may be modified, &c. &c.; and Bytown is No. 4 on schedule B., which is not however intituled "*towns.*"

The provisions of the 208th section of chapter 81, as amended, are continued in force until 31st Dec. 1851 by 17th sec. 13 & 14 Vic., ch. 64, and "the persons therein described as entitled to elect and be elected under the same shall be those entitled to elect and be elected respectively at all the municipal elections to be held under the said act previous to that day."

The new assessment law, 13 & 14 Vic. ch. 67, did not affect this election, or the qualification of parties, candidates or voters, thereat. During the same session another statute was passed (ch. 83) "to remove doubts as to the effect of the disallowance of the act incorporating the town of Bytown,' which enacts, that notwithstanding that disallowance, the rights, powers, duties, obligations and liabilities" of the corporation of Bytown, constituted under the

12th Vic. ch. 81. and of the council of the town and of the mayor and every member thereof, and of all officers thereof, and of all other parties with respect to them, shall be and shall be held to be the same to all intents and purposes as they would have been if the act incorporating Bytown (except the 44th section) had remained in force unto the 1st of January 1850 ; and more especially that the council of the town shall have power to collect and recover all arrears of taxes imposed by the late corporation for 1849 ; to enforce statute labour or the commutation ; and shall pay all just liabilities of the corporation ; and shall complete and may enforce the completion of all contracts made by or with the late corporation ; and that all elections of councillors, mayor or other officer or functionaries in or with regard to the said town, and all by-laws &c. made or things done by the council of the town, or by the mayor, council, officers or functionaries, or any of them, or by any person under their authority, shall be and shall be held to have been valid and binding, and shall have and be held to have had full force and effect, provided the same would have and would be valid and binding and have force and effect if the act incorporating Bytown had remained in force until 1st January 1850.

The last proviso in section 208 of 12 Vic. ch. 81 (as amended) makes Bytown an incorporated town within that section ; and no other force can be given to that proviso than to hold that, as an incorporated town, its elections are to be governed by that portion

of the section, which is in the following words: "and such persons as have *heretofore* had a right to vote, or be elected at the municipal elections of any city, town or village heretofore incorporated, or having a board of police established by law for the same, shall have the right of voting and being elected for the city, town or village, aldermen and councillors to be elected under this act for such city, town or village respectively." I take this to mean the same thing with regard to Bytown as if the legislature had said that the persons qualified to be elected aldermen or councillors shall be those named in the fifth section of 10 & 11 Vic. ch. 43; and those qualified to vote at such elections shall be those named in the sixth section of that statute.

It appears, also, that an election took place in January 1850 under the 12 Vic. ch. 81, and the act above referred to (13 & 14 Vic. ch. 83) recognized and confirmed it. The town council was thus in undoubted legal existence, and had all the powers conferred by ch. 81, 12 Vic., among which, by 22nd subsection of sec. 60, coupled with secs. 59, 61, 67, 80 & 81, was a power to raise, levy and appropriate such moneys as might be required for the purposes set forth in the act, by means of a rate to be assessed equally on the whole ratable property in the town, according to any law which shall be in force in Upper Canada concerning rates and assessments. The 3d sec, of 12 Vic. ch. 80 was obviously intended to save all provisions contained in different statutes which incorporated cities, towns, &., until a general assess-

ment law was passed; and, but for the peculiarity of the situation of Bytown, its charter having been disallowed, the assessments would have gone on under the provisions therein contained—that is, the town council would, under the authority of 12 Vic. ch. 81, impose rates on property according to the 20th sec. of 10 & 11 Vic. ch. 43. Under sec. 78 of ch. 81, they could appoint assessors and collector, though a difficulty as to the qualification of assessor might arise, not in terms perhaps met by sec. 208; and they could, under the 200th section, settle with and pay the county council for the use of the gaol and court house; and the only question is—at what assessed value is property to be rated, and what kind of property is liable to be assessed? It appears to me that, in the absence of any other enactment, the statute of Upper Canada, 59 Geo. III. ch. 7, must govern in these particulars; and, taking that as the foundation, the town council would have no other difficulty in exercising the power given them to impose rates. There would then be a collector's roll, which could be made available under sec. 65 of 12 Vic. ch. 81, so far as ascertaining *assessed value* is required, or the names of parties assessed, under the 10 & 11 Vic. ch. 43, secs. 5 and 6.

From the certificate of the town clerk, however, I infer that no exercise was made by the town council of the power to enforce rates in 1850, but that the county council did impose rates, according to 59 Geo. III. ch. 7, on the town, and that the assessment roll (*quære*—same as collectors?) was used at the elec-

tion, and every person named on it was allowed to vote, thus confirming the third objection taken by the relator. What effect this had on the election is not shewn. It is not even *positively* affirmed that any person voted who was not qualified according to 10 & 11 Vic. ch. 43. The affidavit says only—"That the returning officer at the said election received votes for the said R. W. Scott from all persons whose names appeared on the collector's roll of the said east ward of the said town of Bytown, without any other qualification, instead of requiring such votes to be qualified according to the 6th section of the 10 & 11 Vic.: that such proceeding, on the part of the said returning officer, was, during the said election, duly protested against by this deponent and his fellow candidates at the said election; and this deponent further saith, that his name stood fourth on the poll at the said election;" according to the certificate of the town clerk, the votes being for the relator 59, and for the candidate next above him 135; but how far this difference of 76 was caused by the course pursued by the returning officer, or who would have had the majority, if only those qualified on the act of 10 & 11 Vic., in no way appears. And whatever might be the effect of the objections to the validity of the election, this alone would render it impossible to order that the relator should be declared duly elected.

In this and in other cases heard by me on the 18th of March, the principal (in some, the only) evidence supporting the statement has been the relator's own affidavit. No objection has been taken to the state-

ment being legally supported in this manner. So far as the matters in the statement are concerned, which are supported by the relator's affidavit, they may be treated as material averments, which, if not denied by the answer may be considered admitted. In like manner, some important facts, by way of answer, have been rested on the affidavit of the defendant alone. There can be no doubt, that if the cases were being tried upon an information in the nature of a *quo warranto*, neither the relator nor the defendant could be heard as witnesses, though it is the established practice to receive their affidavits in support of and against granting the rule for leave to file such information. In other cases, besides that the objection has not been taken, my judgment has rested on grounds to which it would not apply—as, where the facts have been admitted at the hearing and sufficiently met by unobjectionable evidence ; but in this case I cannot say that any judgment against the defendant would not be founded on the unsupported affidavit of the relator, and that offered as evidence of collateral facts, as facts, contained in the statement, and considering that he claims to be declared entitled to the office and to recover costs, I am not prepared to give judgment in the case without further evidence. The rules of court authorize my calling for further affidavits ; and I wish therefore to receive such affidavits as either the relator or the defendant may be advised to file, other than their own, on the question of defendant's qualification according to the act 10 & 11 Vic., ch. 43. The relator to serve copies of his

affidavits on the defendant, or at his residence at Bytown, by the 14th of this month, and the affidavits of relator and of the defendant in reply, to be filed with the clerk in chambers, on or before the 21st day day of this month, on which day I shall be prepared to hear the case on the new affidavits.

An additional affidavit of the defendant is this day (21st April, 1851,) put in sworn 16th April, 1851. The defendant swears that he is seized in fee of lot No. 16, on the north side of Daly-street, and 16, "on the south side of Besserer, (*quære*—street ?) in the said town of Bytown, on which parcel of land is erected a frame dwelling-house; that the property was assessed in 1849 at 150*l*;" and that he is seized in fee of the following vacant lots in Bytown—viz., No. 13, south side McKay-street; 21, 25, 26 and 27, south side of Besserer-street; and 21, 25, 26 and 27, north side of Daly-street; and that, during the year 1849, vacant lots in Bytown were assessed at not less than 20*l*. each.

This affidavit does not establish the defendant's qualification.

I have already stated my opinion, that the qualification is that set forth in the fifth section of 10 & 11 Vic. ch. 43. The town councillors are to be elected from among the inhabitant householders. It is directly objected in the relator's statement, supported by his affidavit, that the defendant was not an inhabitant householder, either when he was elected or when he assumed the office. I look upon this statement in the same light as a material traversible allegation

in a declaration, and that the defendant, omitting wholly to answer it, must be taken to concede that it is true. If so, he was not, in my opinion capable of being elected, and cannot be permitted to retain the office. It would, however, be contrary to reason and to many authorities to order that the votes given for him should be considered as thrown away. For all that appears, the electors had no notice when they voted, of this objection.

The judgment will therefore be—that the defendant usurps the office, and must be forejudged and excluded from using the same, and that there be a new election.

Considering the peculiar circumstances of the case, I shall give no costs.

MARMORA FOUNDRY COMPANY v. MILLER.

Time for appearing—Pleading, &c.—8 *Vic. ch.* 36—12 *Vic. ch.* 63.

The extension of time for appearing, pleading, &c., in certain cases to twelve days instead of eight, under the *testatum writ act*, (8Vic. ch. 36), is not affected by 12 Vic. ch. 63.

The summons to compel the appearance of this defendant was issued from the office of the deputy clerk of the crown for the county of Hastings, at Belleville, and directed to the defendant as residing in Woodstock, in the county of Oxford.

The body of the writ commanded that the defendant do enter an appearance within eight days after service of the same, in the office of the deputy clerk of the crown for the county of Hastings. The writ

was served on the defendant at Woodstock; and he moved to set aside the service, on the ground that the writ was irregular in commanding him to appear in eight days, contending that as it was served upon him in a county west of Toronto, commanding him to appear in an office east of Toronto, he was entitled to twelve days to enter an appearance.

BURNS, J.—The question is, to what extent the statute 8 Vic. ch. 36, known as the *testatum writ act* is now in force, as applicable to the writ of summons. The 8th section of that act enacts that in such cases as this, under the former practice, the time for filing an appearance and for pleading, replying and rejoining thereto shall be extended to twelve days, any existing provisions to the contrary notwithstanding.

The statute 12 Vic. ch. 63, sect. 34, enacts that writs therein authorized shall be the only writs for the commencement of personal actions, and that all the provisions of 8 Vic. ch. 36, shall continue in force and be applicable to the writs directed by 12 Vic. ch. 63, except in so far as the provisions of the former are inconsistent with the latter, and shall apply to the practice to be observed. Section 22 of 12 Vic. ch. 63 enacts that the process in all actions shall be according to the form contained in the schedule No. 1. The form given in the schedule mentions that the appearance shall be within eight days after service. I should have had no difficulty if nothing more had been enacted upon the subject of the writ than this, for though the act does say the writ shall be in force, I take that to be only directory, and it

would not have been inconsistent with any enactment on the statute to have altered that form to twelve days, in cases contemplated by the former to twelve days, in cases contemplated by the former act, where defendants, according to their residence, would under the old practice have been entitled to that time. The 26th section enacts that all necessary proceedings to judgment and execution, except as thereinafter (in the act) provided, may be had thereon without delay at the expiration of eight days from the service or execution of the writ of summons or capias, as the case may be—on whatever day the last of the eight days may happen to fall, whether in term or vacation. This is the provision which creates the difficulty.

The best opinion I can form upon it is, that the *testatum writ act* is preserved as respects the distinction of the eight and twelve days. Some effect must be given to the words in the 26th section, except as herein after *provided*, and I see no other effect to give than to apply it to the provisions of the 34th section.

We have two exceptions in the two clauses—the first is that proceedings may be had at the expiration of eight days from the service, *except as hereinafter provided*; and in the 34th section, the exception is that all the provisions of the former act should continue in force and be applicable, except in so far as the same are inconsistent with the last act.

It appears to me the effect of the two exceptions is to leave the whole act in force, except changing

the forms of the process used and other formal matters necessary to work the new system ; and that the substance was intended to be preserved.

I must therefore make absolute the summons for setting aside the writ of summons with costs.

SCADDING V. WELCH.

Appearance—Irregularity—Waiver.

An omission to enter an appearance is an irregularity merely, not a nullity, and unless promptly complained of, will be cured by waiver.

The failing to mark the judgment paper "Inferior jurisdiction," is an irregularity which may be cured by waiver.

The defendant applied to set aside all the proceedings for want of an appearance by or for the defendant, because the appearance paper which was filed was not said to be done according to the statute—or failing that, then, why the interlocutory judgment and subsequent proceedings should not be set aside, on the ground that the judgment paper was not marked with the words "Inferior jurisdiction."

The first objection was rested on the ground that a want of a proper appearance, either by the defendant or the plaintiff for him, is a nullity, and not an irregularity merely, and could not be waived by what took place after.

It was met by affidavits, shewing that defendant, during the process of the suit, went to the plaintiff's attorney, and also to the plaintiff himself, to ask for time to pay the debt. The defendant was to have given a cognovit for the amount; but failing to do so,

damages were assessed on the 14th October last. After the assessment the defendant called to give his cognovit, but he was told that to do so there would only be an additional expense : and the plaintiff gave him time to the 1st of July to pay the debt.

Burns, J.—Whatever at one time may have been thought the true view, as to the want of an appearance, whether it were a nullity which could not be waived, the recent decisions go the length of deciding that it is now to be treated as an irregularity, the consequence of which is that a defendant will have to shew something more than the mere defect, of the want of a proper appearance paper, when he does not come promptly to the court to complain of the irregularity.

In this there is no shadow of a pretence for saying that the defendant did not know what was going on all the time. He is quite too late in complaining after judgment signed, and execution issued against him. In addition to the case cited for the plaintiff of Hawkins v. Hassell, (12 M. & W. 776), I refer to Charlesworth v. Ellis, (10 Jur. 94).

The second objection is only an irregularity at most, if it be an objection, and is also cured by the waiver.

Doe dem. Shortts v. Roe.

12 Vic. ch. 63, sec. 36—Declaration in ejectment.

The declaration in ejectment is not included in the proviso to section 26 of 12 Vic. ch. 63, but may be served between the 1st of July and 21st August.

This was an application to set aside a declaration

in ejectment, for irregularity, with costs—the copy of the declaration having been delivered between the 1st day of July last and the 21st of August.

The irregularity complained was the service of the declaration during vacation—allowed or required under the 26th section of 12 Vic. ch. 63—which the defendant contended applied to cases of ejectment as well as to cases in which proceedings were commenced by summons or capias.

This section enacted that if any writ of summons or capias, issued by authority of that act, be served or executed on any day, whether in term or in vacation, all necessary proceedings to judgment and execution might, except as thereinafter provided, be had thereon without delay, at the expiration of the eighth day from the service or execution thereof: provided that if *such writ* should be served or executed on any day between the 1st day of July and the 21st day of August in any year, special bail might be put in by the defendant in bailable process, or appearance entered either by defendant or plaintiff, on process bailable at the expiration of such eight days: Provided also (or *but* that no declaration or pleading should *be filed* or delivered between the said 1st day of July and the 21st day of August).

McLean, J.—This section applies evidently to suits commenced by writs of summons or capias; and restrains the filing and service of declarations in such cases between the 1st of July and 21st of August. It does not, however, apply to cases in ejectment, in which the declaration is the commencement of the

action ; and there is a good reason why it should not do so, inasmuch as the rights of parties might some time be barred by the Statute of Limitations, if they were debarred from even commencing a suit.

It is, I think, clear the legislature did not intend to prevent actions being commenced in any case ; the commencement of all other actions is expressly recognized ; and the filing and service of a declaration in ejectment, being the commencement of action, the section to which I referred does not apply to it.

The defendant has moved to set aside the service with costs ; and the summons must be discharged. Had the summons been silent as to costs, I should probably have discharged it without costs, the point (though not in my opinion doubtful) being new ; but as costs were asked to be paid by the other party, the defendant cannot complain that he should be required to pay costs on failure.

Rule discharged with costs.

Lyman v. Brethron.

*Designation in affidavit—Reference to jurat—Direction of writ "to Sheriff of United Counties of Wentworth and Halton," bad—*14 *&* 15 *Vic. ch.* 3. *Amendment of writ—Second arrest.*

An affidavit by "*I. B., the defendant in this cause*," is sufficient, without any further addition.

The jurat may be referred to, to explain the date of a fact deposed to in the affidavit.

Where defendant was arrested on a writ issued and tested on 3rd January 1852, and directed to the Sheriff of the United Counties of Wentworth and Halton : *Held*, that since the 1st January 1852, there was no such officer ; and the arrest was set aside with costs—the bail bond ordered to be

given up to be cancelled, the defendant undertaking to bring no action, and entering a common appearance.

Held, that the writ might be amended, but the copy not.

On application to be allowed to arrest defendant on the amended writ, the judge declined to give such permission.

The plaintiff applied at the same time to amend the writ and the copy; and urged also, that terms should be imposed on the defendant—among other things asking that there should be permission reserved to execute the amended writ, by arresting the defendant again.

The amendment was opposed either as to the writ or the copy; the condition, especially, was resisted.

Defendant applied to set aside the arrest with costs and to discharge the defendant from custody, and to order the bail bonds given to the sheriff of the united counties of Wentworth, Halton and Brant to be cancelled; and to set aside the writ, copy and service, with costs, for irregularity.

The application was made on the affidavit of Joshua Brethron, of the city of Hamilton, in the county of Halton, one of the united counties of Wentworth, Halton and Brant, the defendant in this cause, "verifying the copy of the writ served on him on 24th day of January *instant*;" that he gave bail, and that it is, as he believed, a true copy of the writ on which he was arrested; and in another affidavit stating that the præcipe called for such a writ and to be so directed as was issued; and that such præcipe was filed on the 3rd January 1852. The defendant's affidavit was sworn on the 26th of January 1852.

Draper, J.—On shewing cause the plaintiff objected to the defendant's affidavit for want of a suffi-

cient addition. The case of Angel v. Ihler, 5 M. & W. 163, affords a complete answer to this objection.

It was also objected that the statement, on "the 24th January *instant*," was insufficient, as it became necessary to look at the jurat, which was no part of the affidavit, to explain what "instant" meant.—Craig v. Lloyd, 3 Exch. 232; and Holmes v. London and South Western Railway Company, 13 Jur. 81, conclusively answered this objection.

The original writ was then put in, issued and tested on the 3rd January 1852, and it is directed to the sheriff of the united counties of Wentworth and Halton and the defendant was (as was admitted) arrested on it in the city of Hamilton, and the sheriff's return of *cepi corpus* is endorsed thereon.

The objection to the writ was, that having issued since the 1st of January 1852, there was no such officer as the sheriff of the united counties of Wentworth and Halton. For schedule B. to the statute 14 & 15 Vic. ch. 5, mentions the counties of Wentworth, Halton and Brant, as a union of counties; and the 2nd section of the statute enacts that the counties mentioned in the schedule shall, for all *judicial* purposes, be formed into unions, as in the said schedule set forth; and that such union, under the name of "the united counties of &c.," shall have in common between them all, courts, officers and institutions, as counties united under 12 Vic. ch. 78 had; and this act came into force on the 1st of January 1852.

I think the objection is fatal. When this writ issued there was no such union of counties as Went-

worth and Halton, consequently there was no such officer as he to whom this writ is directed.

I am of opinion that the writ may be amended; but the copy I think, cannot: and then the defendant is entitled to be discharged out of custody, because, assuming the writ to be amended, he had not a true copy of it delivered to him according to the statute, upon or *forthwith* after the arrest. But the effect of amendment, as it seems to me, must be that the defendant being discharged from custody on the arrest, could at most be compelled to enter a common appearance. And I have no difficulty in making an order to set aside the arrest and direct the bail bond to be delivered up to be cancelled, the plaintiff to pay the costs of this proceeding, and the defendant undertaking to bring no action, and at the same time to direct that the writ should be amended; and to superadd a condition on defendant's being discharged, that he should enter a common appearance. The plaintiff, however, asks as a further condition, that the defendant should be arrested again on the amended writ. I find no authority for imposing such a condition; whether the plaintiff can hold the defendant to bail at all, for this cause of action, is one question. The case of Richards v. Stewart, 10 Bing. 322, is in the plaintiff's favor, as shewing that under circumstances the defendant may be held to bail on the same affidavit, after an arrest on a previous writ has been set aside, and a defendant discharged from custody on entering a common appearance; but in that case the first action was discontinued, and that is certainly no authority for what is asked here.

No order of a judge is necessary here, as in England, to permit an arrest at all under the statute 1 & 2 Victoria, ch. 110. Before that statute, there was a rule in the English courts—Hilary Term, 2nd Wm. IV., No. 7, (3 B. & Ad. 375)—that after *non pros.*, nonsuit or discontinuance, the defendant should not be arrested a second time without a judge's order; but our courts have not, I think, adopted this rule. Whatever doubt there might have been before the 12 Vic. ch. 63, I think there can be none now, but that the process is the commencement of the action; and if this process, being amended, stands as non-bailable process, the defendant entering a common appearance, I do not think a new process could issue in the same action to arrest the defendant, nor could the defendant, as it appears to me be arrested on a process which must be taken to have been executed, when the defendant being discharged from custody under it, has nevertheless appeared to it. On the whole I am of opinion I cannot impose such a condition. The plaintiff may, if so advised, apply, as was done in Richards v. Stuart, for leave to discontinue and arrest again. But I think I have no authority to give such vitality again to the process by amendment, or to treat it as never having been acted upon.

The only order that I shall make will be that the arrest be set aside and the bail bond be delivered up to be cancelled, with costs to be paid by the plaintiff; the defendant undertaking to bring no action, and entering a common appearance to the writ, which is

to be amended as prayed for by the plaintiff—9 M. & W. 473; 9 M. & W. 342; 6 M. & W. 731; 10 Bing. 27; 10 Bing. 322; 8 Scott, N. R. 172; 16 M. & W. 96; 2 Dow. N. S. 386; 8 Dow 370; 15 M. & W. 559; 1 Q. B. 914; 1 A. & E. 331; Collins v. Weatherly, 5 Tyrw.; Jackson v. Jackson, 2 Dow. 182; 2 Dow. 780.

This order however, may not be one to which the plaintiff may desire to be an assenting party, and he may prefer simply that the arrest should be set aside, plaintiff paying costs, and defendant being restrained from bringing an action, and the writ being amended leaving him (the plaintiff) to take such further proceedings as he is advised. I cannot order that the plaintiff shall be at liberty to arrest defendant again, under the writ. Orders to arrest are given under our provincial statute, in cases in which the plaintiffs own affidavit is not by itself sufficient to warrant an arrest; but in no other case does a judge or the court interfere to order an arrest. In England, an order for a second arrest was necessary, under the rule Hilary Term, 2nd Wm. IV., No. 7, or since then under the statute 1 & 2 Victoria. But we have no such rule or statute; and I think therefore the plaintiff must act on his own responsibility as to a second arrest at all. There are cases, some in our own court, which warrant such a proceeding. But I find no instance where it has been done under an *amended* writ which, in its original state, has been acted upon. If this writ cannot be used for such purpose, and the plaintiff desires to arrest a second time—he

must discontinue. If he desires to proceed on the amended writ as on a non-bailable process, I have no objection to add a condition to the defendant's order, setting aside the arrest—then he shall enter a common appearance.

Reg. ex. rel. Metcalf v. Smart.

Quo warranto—Abandonment of first summons—Power of judge in chambers—12 Vic. ch. 81—13 & 14 Vic. ch. 109—Qualification of township councillor.

The writ of summons which first issued in this case was abandoned for informality, before cause shewn; not by leave of the court, or by quashing the first writ, but merely at the will of the relator, he having served a notice on the defendant that he need not appear to such writ, and the other papers served on him, he (the relator) having abandoned the same.

On the argument in the present case, it was objected by the defendant's counsel that under these circumstances it was not competent for the learned judge to order the issue of a second writ of summons.

But *held* by *Sullivan*, J., that the judge by whose order the writ of summons issued, standing in the place of the court, it was not competent for the judge in chambers to review the proceedings had before the judge so put in the place of the court, and consequently that he could not entertain the objection.

Held also, that to entitle a person to be elected a township councillor, under 12 Vic. ch, 81, and 14 & 15 Vic. ch. 109, it is necessary that he should be rated *by name* on the assessor's roll.

A writ of summons in the nature of a *quo warranto* was issued in this case, upon the order of Mr. Justice Draper, made on the 29th January last.

The summons was upon the defendant Smart, to answer and shew by what authority he claimed to use, exercise and enjoy the office of town councillor

for ward No. 2, in the town of Port Hope ; and why the relator should not be declared to have been duly elected to the said office, and be admitted to take his seat as such councillor.

The objection to the election of defendant made in the statement of the relator was, that the said David Smart is not, and was not at the time of the election, *rated* in the collector's roll of *the said town* of Port Hope, or on the collector's roll of any of the wards of the *said town* for the year next before that in which the said election was holden, either as a freeholder or householder of the said town of Port Hope, nor as seized or possessed of any real or personal property whatsoever, as proprietor or tenant, or otherwise, either in fee or freehold, or for a term of one year, or upwards, situate within the said town or elsewhere.

Secondly—That the said David Smart, at the time of the said election, was not rated on the said rolls, or either of them, for any real property whatever.

Thirdly—That the said relator had the greatest number of votes recorded for him next after the said David Smart, and should have been declared duly elected to the said office in the stead of the said David Smart, the said electors having been duly informed that the David Smart was not qualified, and that their votes in his favor would be thrown away.

The summons being duly served, the case came on to be heard before me. The statement of the relator was supported by his affidavit, stating that the election was held on Monday the 5th day of January instant, and Tuesday the 6th day of the same month:

that at the opening of the election the following persons were nominated and seconded, as candidates for the said office of councillor for the said ward—that is to say, John Shuter Smith, David Smart, Peter Robertson, Joseph Gallagher, John A. Ward, and the relator: that before the polling commenced in the said ward a question arose respecting the qualification of the said David Smart, the said John Shuter Smith and others, in the presence of the electors of the said ward and others there present, contending that the said David Smart was not duly qualified to sit as such councillor, and the said David Smart and others insisting that the said David Smart was qualified: that the poll was finally closed in the afternoon of the 6th February, and the votes then stood as follows—that is to say, for the said John Shuter Smith, fifty-three; for said Peter Robertson, forty-six; for the said David Smart, forty-four; for the relator thirty-nine; for the said Joseph Gallagher, thirty-one; and for the said John A. Ward, twenty-seven: that the said David Smart at the time of the election was not rated in the collector's roll of any ward of the said town for the year next preceding the said election, for any real property whatsoever, nor was, nor is he so rated as a householder, or freeholder of the said town, seized or possessed of any real property held by him either in his own right or that of his wife, or otherwise as proprietor or tenant thereof or otherwise, situate in the said town or elsewhere: that at the close of the poll the returning officer declared that the said Smith, Robertson and

Smart had received the largest number of votes and were duly elected: that since the election Smart hath taken his seat and acted as councillor for the said ward: that the paper annexed, marked A., is a true copy of the assessment roll for the said town of Port Hope for the year next preceding the said election, so far as relates to the said Smart; and that the paper annexed marked B. is a true copy of the collector's roll for such preceding year, so far as relates to the said Smart; and that the name of the said David Smart, or the property for which he is rated, doth not appear upon the said roll, or either of them, elsewhere or otherwise than as shewn and expressed by the said annexed copies respectively.

Upon the copies of the rolls annexed the defendant appears rated for some moveable property, but not for any real estate.

The relator's counsel further submitted to the learned judge on moving for the writ of summons a notice to the defendant that he need not appear to the writ of summons and other papers served on him on the 15th January; the relator having abandoned the same for informality, and intending to proceed *de novo*. This notice was dated 21st January, 1852, on which day it was served, as appears by an affidavit of service annexed. The writ of summons alluded to in the notice was also laid before Mr Justice Draper. It was not materially different from the writ before Mr. Justice Sullivan in this present case. It was tested the 13th January last; and called upon the defendant to shew by what authority

he claimed to use, exercise and enjoy the office of town councillor; and why the relator should not be declared to have been duly elected; and why he should not be admitted in the place and stead of the defendant. The affidavits mentioned in the notice appeared to be the same upon both writs of summons, namely, that of the relator, and the affidavits of Peter Robertson and Pollard; but the statement of the relator, annexed to the first summons, only shewed causes why the election of the defendant should be declared invalid—namely, that he was not rated on the assessor's or collector's rolls of any of the wards of the said town for the year next before that of the election, either as a freeholder or householder; nor as seized or possessed of any real or personal property whatever, either as proprietor or tenant, either in fee or freehold, or for a term of one year or upwards, situate within the said town or elsewhere: and secondly, that the said David Smart was not rated upon the said rolls, or either of them, for any real property whatever. The statement of the relator stopped short here, and laid no foundation for the claim on his part to be declared duly elected and admitted to the office in the place of the defendant.

An affidavit of Mr. John Shuter Smith's was also laid before Mr. Justice Draper, to the effect that the deponent had been engaged by the relator to draw up the affidavits and documents upon which the first summons was issued—that he was guided by the rules of court of 1850; that he afterwards discovered that new rules had been framed, and that

the proceedings were therefore insufficient; and that he advised the relator to abandon the same, and to commence *de novo*, and therefore the notice before mentioned was given.

On the return of the summons last issued the defendant appeared by his counsel, and his affidavits were read, to the effect that at the election for ward No. 2, in Port Hope, he was elected by a majority of votes in the said ward to fill the office of town councillor; and that he was and still is possessed of real property as tenant thereof, to the amount of 50*l.* per annum: that the said *property* was stated on the collector's roll for ward No. 1 of the said town, for the year next preceding the election, to the amount of 50*l.* per annum: that the taxes have been paid: that defendant holds the said property for two years, under a lease made the 13th day of July, 1850, between John Simpson and Frederick M. Gates of the first part, and George M. Fowle, acting on behalf of Smart, Fowle and Freeman, & Co., of the second part, of which said firm the defendant was a partner: that deponent went into possession under the said lease and continued in possession until the 27th of August following, when the said Fowle assigned his own interest, and that of the firm of Smart, Fowle, Freeman & Co., to David Smart, who went into and continued in possession of the same: that the lessors consented to the engagement, and received rent at the rate of 50*l.* per annum, from deponent: that the leased premises are situate in Ward Street in Port Hope, and comprise a town lot, shop and

two storehouses, rated on the collector's roll for ward No. 1, at the annual value of 54*l.*, in the name of the lessor's of the deponent; that deponent proposed to the assessor to give in the premises above mentioned, but was informed by him that the sum had been given in by his neighbour, who was agent for the lessors: that by the terms of the lease deponent was liable for the taxes.

On the argument of the case before Mr. Justice Sullivan, by *P. M. Vankoughnet*, Q. C., on the part of the relator; and *J. H. Cameron*, Q. C., for the defendant. No objection was taken to the evidence on either sides, and it was admitted that the defendant's name did not appear on the roll as rated for any real property in Port Hope; but that he was possessed, as set out in his affidavit. Had any objection been made, the learned judge said he should have required the production of the lease and agreement stated in the defendant's affidavit.

On the part of the defendant it was argued, that it was not competent to the learned judge to order the issue of a second writ of summons, the first remaining undisposed of: that the statute did not give a right but to one writ: that a relator, like every other person seeking to have an information exhibited, must come with his whole case; and that he could not be permitted to abandon one writ of summons, for deficiency in the proceedings, and of his own will to sue out another, the first not being quashed.

And secondly, that it was not necessary that the defendant's name should appear on the roll as rated

for any property; that the provisions of the statute referred altogether to the votes; and, provided that the candidate elected was really possessed of the property qualifications, so as to enable him to take the oath prescribed by law, it was a matter of indifference, whether or not he was rated in his own name for the property.

The relator's counsel insisted on the converse of these propositions; and further, argued that the duty of the judge in chambers was to dispose of the summons before him upon the evidence, without going behind the immediate proceedings before him to enquire into any foreign matter to invalidate them.

SULLIVAN, J.—The writ of summons in the nature of *quo warranto* is provided by 12 Vic. ch. 81, sec. 146. The language of the statute is "That at the instance of any relator, having an interest in any election to be held under this act, *a writ of* summons in the nature of a *quo warranto* shall lie to try the validity of such election; which writ shall issue out of her Majesty's Court of Queen's Bench, in term time, or upon the fact of a judge thereof in vacation; upon such relator showing upon affidavit to such court or judge reasonable grounds for supposing that such election was not conducted according to law; or that the party elected or returned thereat was not duly and legally elected. And upon any relator entering into a recognizance before the said court, or any judge thereof, or before any commissioners, &c., conditioned to prosecute with effect the said writ, and to pay the party against whom the same shall be

brought, &c., all such costs as shall be adjudged to the said party against the said relator, thereupon such writ shall be issued accordingly; and the said writ shall be returnable on the eighth day after that on which it shall be served upon such party by a delivery thereof to him, &c., before some one of the judges in chambers, which judge shall have power, and is hereby required to proceed in a summary manner upon statement and answer, without formal pleadings, *to hear* and determine the validity of each election; and to award costs, &c."

Taking this section of the statute by itself, one would suppose that the statute contemplated only one writ, upon the return of which the validity of the election was to be *determined*. The Queen is the plaintiff; the defendant is summoned to answer a *quasi* criminal charge. It is not like an ejectment, where the plaintiff, until lately, was a fictitious person—every usurpation of office in authority is a usurpation upon the sovereign; and I should suppose the defence of *autre fois acquit*, would, if set up in the course of the summary proceedings, be a good defence.

The 149th section of the act provides however for the case of more than one writ being sued out, for it enacts, "That where two or more such writs shall be brought to try the validity of the same election, all writs after the first shall be made returnable before the same judge before whom such first writ shall have been made; and such judge shall proceed upon such writs by giving separate judgment on each, or one judgment upon the whole, as the justice of the case may in his opinion require."

Whether this section meant to authorize more than one writ to try the validity of the election of one person; or whether it was intended to provide for several writs to try the validity of the election of several persons, involved in the question of the validity of the same election; and whether this section be not superseeded and virtually repealed by the amendment of section 146, contained in the statute 13 & 14 Vic. ch. 64, where it is provided that, "whenever the grounds of objection against any such election shall apply equally to all or any number of the members of any such municipal corporation, it shall and may be lawful for the relator to proceed by one writ of summons against all such members;" I am not now called upon to express an opinion; but it seems to me clear that the 149th section never intended that the same relator should have two writs of *quo warranto*, to try the validity of one election of one person. I do not understand how the judge could give different judgments between the Queen and that person, either at the instance of the same or different relators.

I look upon the relator applying to the court or to a judge for a writ of summons, as if in England he were moving the court for leave to file a criminal information, or an information in the nature of a *quo warranto*, only there is no rule *nisi*; and unless the relator chooses to disclose the fact, the judge or court would not know of any former proceeding. The authorities are numerous to shew that if a relator fail in the first instance in making out his case, he

cannot be permitted to apply anew, unless his failure were caused by the misentitling of affidavits, or such like formal error—Rex v. Wright, 2 Chit. 162; Rex. v. Williamson, 3 B. & A. 582; Rex v. Smith, 4 B. & Ad. 861; Rex. v. Manchester and Leeds, R. W. C., 8 Ad. & El. 413; Rex v. Hurland, 8 Dow. 323; Sanderson v. Wesley, 8 Dow. 152; 1 Dow. N. S. 792; 21 L. J. Q. B. 40; 4 M. & S. 253; 9 Dow. 1021; 2 N. & M. 378; 4 Ad. & El. 861; 5 Ad. & El. 780; 7 Ad. & El. 522. In Rex. v. Slythe, 6 B. & C. 244, the objection was not taken that there had been a former application by a different relator; and in Rex. v. Bond, 2 T. R. 767, the court appears to have held that even the filing informations long before, by a different relator was no objection.

But these are all cases where the defendant has had an opportunity of shewing cause against the rule *nisi* for an information, and where the court has exercised a discretion clearly within its power. The present is a case where a relator *ex mero notu*, abandons a writ actually sued out and served; and whether the defect for which the proceedings is abandoned be one of mere form or of substance, the allowance of such an abandonment, not by leave of the court or by a quashing of the first writ, but at the will of the relator, would involve the consequence, that although the court or judge, in deference to authority, would feel bound to deny to the relator the oportunity of making a new case, upon failure of his first motion. yet, by means of a notice like the present he would at any time before judgment, if

within the time allowed by the statute, have the power of renewing his case as often as he pleased; and also, that as many writs might be sued out as there could be found relators interested in the election—which latter may probably be authorized by the 149th section.

But, grave as the objection to the present proceeding appears to me, I do not see how it can be made available before the judge, whose duty under the statute is to hear and determine the matter of complaint. The statute directs the first motion to be made in term time, and before a judge in vacation; the judge is here put in the place of the court; and it is not, I think, for the judge in chambers, who merely hears the case, subject to the approval of the court to which he makes his return, to review the proceeding before the court, or the judge by whose order the writ of summons issues. It is true that in an *ex parte* application, upon which a rule is in the first instance issued, the court or judge making the rule or order may not have been made aware of a previous proceeding—nevertheless, the rule or order is made by what I consider a superior authority, over which the judge who hears the case has no control.

The pendency of a former indictment or information for a crime, cannot be pleaded to another for the same offence.—per Buller, J., Rex v. Stratton, Doug. 240. But when the Attorney General filed an ex-officio information, after a criminal information had been granted for the same offence at the instance of a private prosecutor, the court stayed all proceed-

ings upon the first information until further order.—Rex. v. Alexander, E. T. 1830; Arch. P. L. & Ev. C. C., 8 Ed. 76.

It seems to me plain therefore, that I cannot give effect to the objection as a matter of defence; and, whatever difficulties may be found to lie in the way of a relator, who out of term has committed a slight informality, and has no opportunity of quashing his first proceeding to make way for another; and whatever obstacles, on the other hand, a defendant may find to his relief from multifarious and oppressive proceedings while the court is not sitting, in which he might ask for relief—I still must entertain the complaint.

Then, as to the only question raised as to the validity of the election complained of, or the right of the relator to take the place alleged to be usurped—namely, whether it is necessary that the name of the candidate should appear upon the collector's roll for the ward for which he claims to be elected, or upon the collector's roll for some other ward of the same incorporated town, as assessed or rated for the real property which he claims to constitute his qualifications. The case depends upon the construction to be placed upon the two statutes, 12 Vic. ch. 81, and 14 & 15 Vic. ch. 109.

As regards voters at the municipal elections, both statutes are explicit in declaring that the voters shall be those whose names appear in the collector's rolls, assessed or rated as freeholders or householders, to a specified value of rent in the year previous to the election. This is the only qualification required.

The 22nd section 12 Vic. ch. 81, relates to township elections, and it provides "That no person shall be qualified to be elected a township councillor who shall not have been entered on the said rolls, for ratable real property, held in his own name or that of his wife."

The candidate is required by the general clause of the act, sec. 129, to make oath as to his qualification.

This section is amended by 14 & 15 Vic. Sch. A. 4, and the following is substituted—"That no person shall be qualified to be elected a township councillor, at any such elections, who shall not be a freeholder or householder of such township or ward, seized or possessed of real property held in his own right, or that of his wife, as proprietor or tenant thereof, *which* shall be rated in such collector's rolls—in the case of a freeholder, to the extent of one hundred pounds or upwards; and in the case of a householder, to the amount of two hundred pounds or upwards.

I think it clear that in this case and elsewhere, in the provisions of the statute, *when* it is *repuired* that the candidate shall have been rated for property held in his own right or that of his wife, the rating must be in his own name, and that his wife's name appearing on the roll will not help him. He is the person to be rated for property held in right of his wife.

This amended section does not distinctly require that the candidate should have been nominally rated; the word "which may be said to apply to the property, and not to the person; and therefore in whose

name soever the property may be entered on the roll, it may be argued that the candidate may claim and shew the property to be his. But, even upon this section, I am inclined to think that the legislature intended that the property should be rated in the name of the candidate, or rather that it should be rated in respect of the property upon the roll, where it would appear whether he was proprietor or tenant freeholder or householder.

The 57th section 12 Vic. ch. 81, relates to village elections, and provides that no person shall be qualified to be elected as a village councillor who shall not be possessed to his own use of real estate held by him in fee or in freehold, or for a term of twenty one years, situate, &c., of the assessed value of 25*l.* or unless he shall be a tenant from year to year at a *bona fide* rent of 20*l.*, or shall be in receipt of 20*l.* or upwards of yearly rent, from or out of real property within such village.

This section appears to me, not to have required nominal assessment of the candidate, for a person receiving rent would probably not be nominally rated.

The section is amended by 14 & 15 Vic. ch. 109, sch. A. 11, which, after enacting that it shall be the duty of the returning officer to procure a correct copy of the collector's roll for such village for the year next before the election, so far as such roll contains the names of all male freeholders and householders rated upon such roll in respect of real property, with the amount of the assessed value of such real property for which they shall be respectively rated, provides

"No person shall be qualified to be elected a village councillor, who shall not be a freeholder or householder of such village, seized or possessed of real property, held in his own right or that of his wife, as proprietor or tenant thereof, *which* shall be rated in such roll, &c., and who shall not be possessed to his own use or that of his wife, of the real property for which he shall be so assessed."

This amended section appears to me clearly to shew not only is the property to appear in the roll as assessed at a certain value, but it must also appear to be assessed eithe as a freehold or leasehold; and I can give no other meaning to the words *for which he shall* be so assessed, than a reference to the roll, where all the freeholders and householders of the village appear nominally, for it is there that they appear to be so assessed.

The provisions regarding incorporated towns, 14 & 15 Vic. sch. A. 12, are like the foregoing, only that the qualification may be in the ward for which the party is elected or in any other ward of the same town. The word 'rated' is substituted for 'assessed'; and the party elected is required to be seized or possessed of the property for which he shall be so rated.

I have no doubt but that the amended statute intended that the names of both candidates and voters should appear as rated on the roll: nor, but that in case of the former it was meant to superadd the qualification of *bona fide* ownership and possession.

The defendant in this case makes out that he was possessed of property, rated in the name of his

landlord. I do not think this sufficient. It is argued on his behalf that the assessment law provides no remedy for the non-rating an owner or possessor of property. That however does not shew that there is no remedy, and even if there was none, the want of remedy would not enable me to disregard what appears to have been the obvious intention of parliament. I think the defence has failed; and, as no objection has been made to the mode of proving the relator next in succession upon the poll book; and, as it is not contended that he was not qualified, or that the voters had not notice of the objection to the defendant's qualification; and as it is sworn that the relator had the next greatest number of votes, and that the qualification of the defendant was openly objected to, my judgment must be for the removal of the defendant, and that he pay the costs of the relator, and that the relator be duly admitted in his place.

Relator to be admitted and defendant to pay costs.

Regina ex rel. Laughton v. Baby.

14 & 15 *Vic. ch.* 109—*Qualification of township councillor—Collector's roll.*

Since the 14 & 15 Vic. ch. 109, it is not necessary to the qualification of a township councillor, that his name should appear on the collector's roll.

The relator complained of the election of the defendant as township councillor for the township of Sandwich, because he was not qualified according to law.

The facts, as they appeared from the affidavits on both sides, were these: The defendant was rated on the roll for the year 1851 at the sum of 79*l.* 10*s.* After the election of township councillors, the defendant qualified himself and took the oath of office. The property which he qualified himself upon, he said, was a lot of land and cottage thereon, in the town of Sandwich, being part of lot No. 12, on the west side of Peter Street, which he considered worth 125*l.*, of which he was the owner in fee.

The defendant swore that it was duly rated on the assessment roll, and the taxes paid; but he did not say in whose name it was rated. The other property mentioned in his qualification, consisted of 400 acres, with dwelling house, barns, &c., and a mill of which he is the lessee, and that was rated upon the roll in the name of Jean Baptiste Baby. This last property he considered worth 500*l.*, and the annual value of 30*l.* From the certificate of the register of the county of Essex, it appeared that the defendant's title to the land and cottage was registered the 20th December, 1851. The certificate said that the lot of land and cottage in the town of Sandwich was rated on the assessment roll of the township for the year 1851 at 200*l.*, but he did not say in whose name it was so rated; and that the mill farm was rated upon the roll at 503*l.* 10*s.*

It was contended on the part of the relator that the defendants name should appear upon the roll rated for the property, otherwise he was not qualified.

On the other hand it was contended that it was not

necessary that the name of the person should appear upon the roll as rated for the property; but it was sufficient if the property be rated.

Burns, J.—I was certainly at first under the impression that it should appear by the assessment roll that the elected person was rated upon the roll, and such was the case formerly; but the statute of last session has made an important change. The qualification required by section 22 of ch. 81, 12 Vic., was that the person to be elected shall have been entered upon the roll as aforesaid, for ratable real property, held in his own right or that of his wife, as proprietor or tenant, to the value of 100*l*. Here no doubt could exist that it did require the candidate's name to be upon the roll for the property upon which he qualified, and he would require still to possess it, or sufficient to qualify him at the time he should take his qualification oath. The form of the oath prescribed to sec. 129 of ch. 81, 12 Vic., shews that the property necessary to qualify must be then possessed.

The substituted provisions contained in 14 & 15 Vic. ch. 109, sch. A. No. 4, are, that no person shall be qualified to be elected a township councillor at any such election who shall not be a freeholder or householder of such township, seized or possessed of real property, held in his own right or that of his wife, as proprietor or tenant thereof, which shall be rated on such collector's roll: in the case of a freeholder to the amount of 100*l*. or upwards; and in the case of a householder, to the amount of 200*l*. or upwards.

Under the former statute, if a person purchased property after the same had been rated, although he could take the qualification oath, yet he was disqualified because his name was not entered on the roll.

In the last statute the relative *which* applies exclusively to the property—it is that which shall be rated upon the roll.

The question then is, when we find the legislature has dropped the expression, that the person to be elected shall have been entered upon the roll, whether it was not done so advisedly in order that persons who may have purchased in the mean time, after property was assessed, be qualified to act as councillors ?

The qualification oath is consistent with that view, for it only points at the estate that then, when oath taken, doth qualify, which would of course relate to the day of election ; and then the words of the act are, "which shall be rated on such roll."

I think that is the true construction to give it, and I am strengthened in that view by comparing the provisions respecting voters. No change has been made as regards these persons having their names upon the roll. The new enactment in that respect is nearly identical with the former. Voters were not required to have their property at the time they voted, for it appears from the 122nd sec. of ch. 81, 12 Vic., they were not required to take any other oath than that of being of full age ; natural born or naturalized subjects ; resident within the township ; and not having voted before at such election. The

person who is rated on the township roll for the property is the person who retains the vote on it. In the case of the person to be elected, as the law stood before the last act, those who sold were disqualified, because they could not take the qualification oath; and those who purchased were also disqualified, because their names were not entered on the roll.

The interpretation I give to the last act qualifies those persons who may have purchased, if the property be sufficient to enable them to swear it is such an estate as doth qualify according to the meaning of the act; and if any objection be made to their qualification, it can be shown that the property has been rated on the township roll for the year preceding the election.

I must therefore adjudge against the relator, and with costs—he bringing the defendant here upon a purely legal question.

Bowes & Hall v. Howell et al.

Power of judge—Plea false in fact.

It is in the power of a judge to strike out a plea false in fact, when a proper case is made out for doing so.

A summons had been obtained in this case to set aside the 3rd plea of the defendants, on the ground that it was false, frivolous, and framed for the purpose of delay.

The defendants pleaded—1st, That they did not make the note. 2ndly, That they paid the note; and 3rdly, that at the time of the making of the promissory

note it was agreed between the plaintiffs and the defendants, in consideration of the defendants making the promissory note for the accommodation of a third person, that the plaintiffs should not prosecute the note when it should fall due, and should extend the time of payment for a period not then elapsed.

It was sworn the plea was wholly untrue in fact, which was not denied.

The only argument urged by the defendant against striking out the plea was, that in this country a defendant had been unrestricted as to the number of pleas; and that the truth of a plea would never be inquired into upon affidavit by a judge, and if it be arguable it must be demurred to, and thus, that it was not properly in the power of a judge to strike out a plea.

BURNS, J.—I think it is in the power of a judge to strike out a plea false in fact, when a proper case is made for it.

Now here the plaintiffs declare on a note payable to themselves, made by the defendants; and the defendants say, in addition to saying that they never made it, and that they paid it, that, because they made it for the accommodation of a third person, there was an agreement that time should be given for payment. Such a plea can only be for the purpose of embarrassing the paintiff; and I can do no better than follow the decision of the learned Chief Justice of the Common Pleas in Sherwood v. March, 1 vol. C. P. Rep. 176.

The plea should, I think, be struck out.

Summons absolute, with costs.

Bain v. Bain.

Frivolous demurrer.

Motion to set aside a demurrer as frivolous.

The declaration contained one count in the sum of 100*l.* for money received by the defendant for the use of the plaintiff, as administratrix, and for money found to be due from the defendant to the plaintiff as administratrix on an account stated between them, and that in consideration of the premises the defendant *promised* to pay the plaintiff—and breach that defendant did not pay the money.

The defendant pleaded in abatement the pending of a former action, and that the plea says the plaintiff impleaded the defendant upon and for not performing of the very same identical *promises* in the declaration mentioned.

The cause of demurrer was that defendant pleaded as if the declaration contained more than one count, and therefore the plea was absurd, insensible and informal. Also, that the plea attempted to put in issue the non-performance of several promises.

Burns, J.—I cannot say I think the demurrer is frivolous. It is very true the declaration contains but one count; but when the plaintiff says the defendant promised to pay the one amount, it by no means follows that he may not have more than once promised to pay. The words *promised to pay*, may include any indefinite number of promises to pay. When the defendant says this action is brought upon the same identical *promises* for which the former action was instituted, he does not put in issue

whether he made more than one promise—all that is in the issue is whether the cause of action is the same.

This case is altogether different from those where different sums are stated with one promise, in which the defendant has treated the declaration as one count; and it is also different from the other class of cases where one sum is mentioned upon different considerations with one promise, and the defendant has treated it by his pleas as being several counts. The defendant here has called that *promises* by name, which the plaintiff says is in effect but a *promise*. It appears to me the parties mean the same thing, only they do it by different means—the defendant takes the plural and the plaintiff says he means the singular; but the defendant's mode must include the plaintiff s.

QUEEN EX REL. FEATHERSTONE v. MCMONIES.

Disclaimer—Costs— Municipal Elections.

Where defendant personally contested the election; but on its being moved against, sent in a disclaimer, praying to be relieved from costs, because being duly elected he was obliged to accept the office under a penalty:

Held, that there appeared no ground why he should be so relieved.

The relator in this case complained of the undue election of the defendant, as Township Councillor of Ward No. 3, in East Flamborough, on the ground of the reception of females and other unqualified persons as voters.

The relator swore to the fact that he was the opposing candidate and had the majority of legal

votes; he therefore prayed to be admitted in the place of the defendant. The relator also shewed that the defendant set himself up and contested the election personally.

The defendant sent in his disclaimer, praying by letter to be relieved from the costs on the ground that he was obliged to accept the office for which he was duly elected under a penalty.

SULLIVAN, J.—I see nothing in the facts disclosed to me which enables me to relieve the defendant of costs; and my judgment is that the defendant be amoved and the relator admitted in his place, and that the defendant pay the relator his costs.

JACOBS v. RUTTAN.

Motion to set aside an award.

A rule nisi to set aside an award was discharged with costs, because it was not drawn up on reading the award or copy, nor the submission, nor the rule making the submission a rule of court.

The rule nisi in this case was to set aside an award made between the plaintiff and the defendant, sheriff of Northumberland and Durham, in a case in which the sheriff appeared to be indemnified.

The rule was, "upon reading the affidavits and papers filed in this cause, it is ordered that the plaintiff, his attorney or agent, do shew cause on the first day of Hilary Term next why the award made by Jonathan Bartlett and Leonard Soper, two of the arbitrators between the parties in this cause, should not be set aside, on the grounds that the said arbitra-

tors proceeded with the reference and arbitration and made their award *exparte* without the hearing of evi dence on the part of the defendant, or any one on his behalf, or without the defendant or any one on his behalf being present at the sitting of the said two arbitrators; and also, on the ground that time was to be allowed by the arbitrators, or two of them, to get a necessary witness in the case, and that the said two arbitrators proceeded with the said arbitration, and made their award before the expiration of the time so allowed; and on the ground that the said arbitrators, or some of them, agreed not to proceed with the said reference or arbitration until the return of Wm. Brown, who was defending this action in the name of the above defendant, who was absent for a material witness in the State of New York, and that the said arbitrators proceeded with the said arbitration, and made their award in the absence and before the return of the said Wm. Brown or his witness; and on the ground that the said award was made upon the hearing only of the said plaintiff or his witnesses, and on other grounds disclosed within affidavits and papers filed *or to be filed*—with leave to the *defendant to file the award*, or a copy thereof, with an affidavit of execution, and also an affidavit of any of the arbitrators, within a fortnight after the end of this term, which papers should be used and read for the defendants at the return of this rule, and in the meantime that all further proceedings in this cause or on the said award be stayed.

This rule was moved on the 29th Nov., 1851.

A preliminary objection was made by the plaintiff's counsel, that the rule nisi was not drawn up on reading the order of nisi prius, or the rule making it a rule of court, or upon reading the award, and that none of them were placed before the court on moving for the rule nisi.

That rule appeared to have been moved on an affidavit of Wm. Brown, the person beneficially interested, as defendant—not having the rule of reference, or a copy thereof, or the award or the copy thereof annexed, and not stating what was awarded, or in whose favor the award was. An affidavit of Mr. Richards, agent for the defendant's attorney, that he received the affidavits annexed on the evening of Thursday, the 20th November, and showing the accidental circumstances why he did not receive them sooner; and that on the following day (the 5th day of June) he thought it was too late to apply; besides which he had not the order of reference, which he considered should be made a rule of court, before the application; that he discovered on the morning of the 28th Nov. that the order of reference had been moved a rule of court on the 24th Nov. on the part of the plaintiff; and that he believed that the said order of reference had been during the whole of the said term in the possession of the plaintiff or his attorney.

The affidavits annexed were, 1st, one of the said Wm. Moore, relating to the merits of the motion, and of one Lyman E. Jacobs, also relating to the merits.

The defendant's counsel also filed a copy of the making the order of nisi prius a rule of court, moved on the 24th Nov. in the same term. This shewed that a verdict for the plaintiff for 60*l.* was taken by consent on the 2nd October, 1851, subject to the arbitration of Leonard Soper, Orsan Kimball, and Jonathan Bartlett, to whom all matters of difference were referred, to make their award, or that of any two of them, ready to be delivered to the said parties or either of them on or before the 17th day of November next coming.

SULLIVAN, J.—No objection is made to the moving of the rule nisi after the first four days of the term, and I take it to be in the discretion of the court to entertain such a motion at any time before judgment entered; and moreover, the submission being of all matters of difference, the defendant had the whole term to move in to set the award aside.

According to the cases Bottomley v. Buckley (*a*) Midland R. W. C. v. Heming (*b*), where the party in whose possession the rule of reference was and in whose favor the award was made delayed making the orde rof reference a rule of court till it was too late to move within the time ordinarily allowed for setting aside awards, the court ordered the party either to make the order of reference a rule of court or to file it with one of the masters, and allowed the other party in a subsequent term to move to set aside the award *nunc pro tunc*. See also Perring v. Keymer (*c*).

(a) 4 D. & L. 157. (*b*) 4 D. & L. 788. (*c*) 3 Dow. 98.

In the present case however there was no necessity for such a proceeding, as the order of nisi prius was made a rule of court on the 24th November; and moreover, as the submission was not merely of the matters in difference in the cause, but of all matters in difference the defendant had the whole of the term to apply to set the award aside, and to take measures for proving the order of nisi prius.—Moore v. Button (*a*).

The objection in the present case is not that the motion was not made in time, but that the award, or a copy, was not before the court; and the rule was not drawn up *upon reading* the award or a copy, or the submission or the rule making it a rule of court. Burton v. Ransom (*b*) decides that a rule to set aside an award must be upon reading the award itself. Sheny v. Ake (*c*); Tracy v. Roper (*d*); Platt v. Hall (*e*).

It should be also upon reading the rule upon which the matter was referred.—Christie v. Hamlet et al. (*f*); Haywood v. Phillips (*g*). In this case it appears to have been held sufficient to draw up the rule upon reading the affidavit and the paper writing thereto annexed, (which paper writing, being a copy of the award, was held sufficient). But in the present case not only is the award not referred to, but there was no copy filed, and it was not even shown to the court whether it was in favor of the plaintiff or defendant. This case also shows that the defen-

(*a*) 7 Ad. & E. 595.
(*b*) 5 Dow. P. C. 597.
(*c*) 3 Dow. P. C. 349.
(*d*) 7 U. C. K. 5.
(*e*) 2 M. & W. 391.
(*f*) 2 M. & P. 316.
(*g*) 6 Ad. & E. 119.

dant had the whole term to move to set aside the award.

In referring to the affidavits filed pursuant to the term given in moving the rule nisi, I find that the beneficial defendant applied for a copy of the award to the plaintiff's attorney so late as the 10th December, after the term, and long after the rule nisi for setting aside the award had been moved: no affidavit of Wm. Brown filed 13th December 1851, and no endeavour to procure the award is shown before that time.

I think, under these circumstances, I must allow the practical objection to prevail. The defendant should have applied for his award previously to his motion. If it were refused him he should have asked for a rule to produce the award and for time to move afterwards *nunc pro tunc*.

The merits of the application seem founded upon a very irregular application of the beneficial defendant to one of the arbitrators, in the absence of the others, to postpone their award until an indefinite time, when he should return from the united States. The arbitrators may have been wrong in proceeding in his absence without a preliminary notice that they would so proceed, but his attorney had full notice of the meeting of the arbitrators at which the matter was to be decided, and no one appeared to ask for a postponement. I am not convinced that any wrong has been done; the sum awarded, 29*l*., is not large, and if it were so, I do not see any way in overruling the practice of the court. In this case not

only is the rule not drawn up in the usual form, but the materials for so drawing it up were not collected when the notice was made, neither was there any well advised evidence to collect them. The rule nisi must be discharged with costs.

Frear v. Ferguson.

Debt contracted in foreign country—Debtor and creditor, foreigners—Law of arrest—Affidavits—2 Geo. IV. ch 1, sec. 10.

If the affidavit of debt, and intention to leave the country be a positive one, neither can the question of the actual existence of the debt, nor the circumstances under which it was contracted, nor the conduct of the defendant after it was contracted, be tried upon affidavits, for the purpose of permitting an arrest.

In England the merits of an arrest are tried on affidavits, but that arises from the alteration of the law by the statute 1 & 2 Vic. ch. 110.

Semble, that it is contrary to the policy of our laws of arrest to permit one foreigner to follow another to this country and arrest him for a debt contracted abroad.

In this case the plaintiffs' agent (the plaintiffs themselves being foreigners residing in New York) made a special affidavit of debt—that is, the affidavit was in the usual form of a debt due to the plaintiffs, and that it was apprehended that the defendant was immediately about to leave Upper Canada, with intent and design to defraud the plaintiffs; and, in addition, it was also sworn that the defendant for the last three years had been carrying on business at the town of Massellon in the State of Ohio; that the plaintiffs supplied the defendant with goods to enable him to carry on his business, and last September

sold him goods to the amount of half of the debt now due, and the remainder in February, the whole account being 273*l.* 7*s.*; that immediately after the last sale, the defendant made arrangements and disposed entirely of his business and the goods; that he received payment in full, and immediately afterwards secretly left, and departed from Massillon, to avoid being arrested in Ohio, and for the purpose of defrauding his creditors; that afterwards attachments were issued against his goods and effects, which were however set aside and held not to be available against the sale; that defendant came with as much haste as possible to Canada, and endeavoured to conceal himself on the way; that he fraudulently left and ran away from the States, with the intention and purpose of cheating his creditors, and that it was not his intention to return to the State of Ohio to resume his business in any way. The affidavit further stated that the deponent believed that the defendant had in his possession money in bills and otherwise to a very considerable amount, over and above what would discharge the debt, and that a considerable portion of it was realised by the sale of the same goods furnished by the plaintiffs; and that the defendant intended to proceed immediately to California.

Burns, J.—The plaintiff might have rested on the ordinary affidavit of debt, and have arrested the defendant without a judge's order, but they felt that in such case it would be open for the defendant to apply for his discharge upon shewing that the plaintiffs and defendant were both foreigners; the debt

contracted in a foreign country, and that they followed him to this country. For these reasons they applied, on the affidavit mentioned, for my order to enable them to arrest the defendant. I granted the order with some hesitation, but with a view to bring up the question whether the special circumstances under which the debt was contracted, or under which the defendant came to this province, would make any difference.

The defendant having been arrested, now applies to be discharged, on the ground that it is against the policy of our laws of arrest to permit one foreigner to follow another to this country and arrest him here for a debt contracted there, and that the special circumstances stated in the affidavit and the judge's order thereon can make no difference.

There was a case—Bostwick v. Wheelock—from Kingston, brought before the Chief Justice in chambers, 29th February 1849, in which the question was raised, but the case was not ultimately decided on that ground. Various objections had been taken to the affidavit to hold to bail, besides the general question. The Chief Justice decided upon some of the objections made to the affidavit, and expressed a strong opinion that he thought the provisions of our law for the arrest of debtors ought not to be extended to cases of one foreigner following another into this country for the purpose of making the arrest.

Another case—McKnight v. Borst—came before myself on 26th March 1850, and I was at first inclined not to interfere in chambers but leave the

defendant to make his application to the court ; and it was the case of Raynor et. al v. Hamilton, Michaelmas, 2 Vic., which induced me to adopt this course. The case of Bostwick v. Wheelock was mentioned to me, and I took pains to procure the papers and a memorandum of the opinion of the Chief Justice, and after I obtained that, then I took the opinon of the Chief Justice on the case before myself, and afterwards consulted my brothers Draper and Sullivan, and we all agreed that it was contrary to the policy of our law to permit an arrest to be made under such circumstances.

The ground of that opinion is this—that inasmuch as before an arrest can be permitted it must be sworn that the defendant is about immediately to leave this province, with intent and design to defraud the plaintiff, it seems contrary to common sense that such an affidavit can in good faith be made against a person who comes here from the place where the debt was contracted, merely for the purpose of transacting some business, or some other temporary purpose, and intending to return again to his proper domicile, where he is again subject to the laws of the country where the contract was made. I must adhere to this decision, and therefore must treat that question, so far as applicable to this case, as settled, until a different opinion shall be expressed by one or other of the courts.

In the cases already mentioned, the special circumstances under which the debt was contracted, or those under which the defendant came to this country,

did not appear, but the present case does contain many circumstances, which if true, would go far to establish a fraud being practised upon the plaintiffs; and the question is whether these circumstances can make any difference in the matter; or if they do, whether they can be rebutted by affidavit on the part of the defendant; and if so, whether in an application like the present the defendant's affidavits can be denied, replied to or rebutted. The reason why the case assumes this peculiar shape is in consequence of the special affidavits of the plaintiffs and their obtaining a judge's order for the arrest. The defendant has made affidavit replying to the circumstances upon which he obtained a summons to shew cause why he should not be discharged. If the plaintiffs had relied upon the simple affidavit of debt in the first instance, then the special circumstances which now appear in their first affidavit would have been brought in reply to the defendant's application. I do not see that the order to hold to bail makes any difference in the question to be decided. It may, perhaps, be questionable, whether an order should have been made at all on this affidavit. By the 10th sec. of ch. 1, 2 Geo. IV., it is enacted that in all cases in which the cause of action *shall be other than a debt certain*, of which affidavits may be made as hereinbefore mentioned, it shall and may be lawful to hold the defendant to bail, a judge's order having been first obtained for that purpose in such cases and in such manner as is provided by the law of England. The affidavit in this case contains all

the requisites to enable the plaintiffs to hold the defendant to bail without an order ; and in such case a judge might say he would grant no order ; but though the order be given it does not place the plaintiffs in any better, nor the defendant in a worse, position. If I treat the case as upon an application upon the ordinary affidavit, then what the plaintiff now asserts would be received as an answer to the affidavit of the defendant ; and if I treat it upon my own order granted on the special affidavit to hold the defendant to bail, then it is open to the defendant to contend that the special circumstances set forth can make no difference. I am of opinion that the special circumstances can make no difference, and the very matter which the plaintiffs wish to rebut proves that such must be the case. The defendant has sworn that he has committed no fraud ; that the debt he contracted with the plaintiffs was liquidated by means of promissory notes which are not yet due ; and that he is on his way to New York to pay the first instalment of the debt. All this may be true or false, or what the plaintiffs may have sworn to may be true or false, but whether the one or the other, I apprehend it is quite new that a judge shall be called upon to try the truth of these as a collateral issue to ascertain whether the case be one of fraud or not before the defendant can be permitted to be held to bail, or whether in the case of foreigners fraud in the contracting of a debt, or practised subsequently to avoid payment of it, would alter our views with respect to the application of our laws of arrest.

If it were so, there is no saying to what use or purpose the privilege to plaintiffs of arresting their debtors might not be applied, and there would be no end of collateral issues, to be determined as preliminary questions, besides in all cases rendering the question one of discretion in the judge, to what extent the permission to arrest should be granted. It appears to me that the defendants affidavit has but little to do with the matter; and, after all, the question is upon the plaintiff's own shewing, whether he can sustain the arrest. Under the English statute 1 & 2 Vic. ch. 110, the practice is for the judges to try upon affidavits whether the order should have been made for the arrest, but that arises upon the peculiarity of the allegation of the law by statute, which abolishes all arrests without a judge's order. This is shewn by Pegler v. Risop, 1 Ex. Rep. 437, and several other cases; but under the old law of arrest in England the merits of arrest could not be inqired into.—Vide Blackenbury v. Needham, 1 Dow. P. C. 139; See Imlay v. Ellefsen, 2 East. 453.

If the affidavit of debt were a positive one, there could be no inquiry upon affidavit whether there were a debt due or not, and so upon the other part of the affidavit there could be no inquiry whether the defendant was or not about to leave the province. The circumstances under which the debt was contracted, or the conduct of the defendant upon his liability after it was contracted, cannot be tried upon affidavit.

A plaintiff must rely on a positive affidavit of debt

being due, or upon such circumstances as in the case other than a debt certain would be sufficient to authorize a judge to grant an order to hold to bail, in either of which cases there can be no preliminary inquiry, and the merits respecting the debt cannot be discussed. In this case the plaintiffs meet their own allegation, that the defendant came to this province for the purpose of defrauding them, by alleging that he is immediately about to return to the very country where the debt was contracted; and so the case, on the plaintiff's own shewing, is reduced to the one point, whether the circumstances under which the indebtedness happened can or cannot be inquired into for the purpose of permitting an arrest; and I think these circumstances cannot be tried in this manner.

The defendant must therefore be discharged.

GOODLER, LANDLORD, v. COOK, TENANT.

Overholding tenant—Notice of inquisition—Costs.

In a proceeding by the plaintiff, pretending to be landlord, against the defendant as an overholding tenant, notice of the inquisition not having been served personally, and there being evidence to shew that defendant was not resident on the premises when such notice was served, the notice and all subsequent proceedings were set aside, but without costs.

Semble, that no motion on behalf of another person, or owner, could be received, as such person could not be bound by any proceedings against the alleged tenant.

This was a proceeding against defendant as an overholding tenant. The motion was made on behalf of the defendant and of another person alleging himself to be the owner of the premises, denying the

tenancy, and also denying that the defendant was resident on the premises at the time the notice of inquisition was served there in his absence.

Sullivan, J.—I do not see how I can entertain any motion on behalf of the alleged owner: she is not bound by a proceeding against the alleged tenant; and if she were really in possession on her own right, and without privity with the alleged tenant; she is not affected by the judgment, and may maintain her possession.

The question of tenancy as between Cook, the alleged tenant, and the person who pretends to be landlord, was one of the matters to be inquired into, and he should have disclaimed his tenancy before the jury.

There is much upon the papers to show this proceeding to be an attempt to obtain possession when the title is in dispute, through the contrivance of a lease to the alleged tenant, to which continuance he was an assenting party.

The notice of the inquisition was not, however, served personally, and there is strong testimony to show that he was not resident on the premises when it was served. The proceedings must therefore be set aside, including the notice and from thence downwards, but without costs.

The Queen on the relation of Henry Bartliff v John Shaw.

The election of a Municipal Councillor for one of the wards of the City of Kingston on the 6th and 7th of January 1851, held invalid upon the ground of his not having been a resident householder within the city or any part of the adjacent county of Frontenac not more than three miles from the Market Square, for *four* years *next* before the election. —9 Vic. ch. 75 sec. 13; 12 Vic. ch, 81 sec. 298; 13 & 14 Vic. ch. 64 sec. 17.

The relator stated his interest in the election as a voter and as a councillor duly elected and returned at the same election for the same ward, and shewed the following cause why the election of the defendant, John Shaw, at the office of aldermen should be declared invalid and void, viz.: that the said John Shaw was not duly or legally elected in this, that the said John Shaw had not been a resident householder within the city of Kingston, or such part of the adjacent county of Frontenac as might be distant not more than three miles from the Market Square of the said city for four years next before the election held on the said 6th and 7th days of January, in the year of our Lord 1851, in Cataraqui Ward, in the City of Kingston.

By the affidavits filed of the relator, it appeared the defendant was absent from the City of Kingston and from the County of Frontenac during the year 1846 and part of the year 1847, and resided with his family in the City of Montreal in Lower Canada during that time, and that defendant returned to reside in the City of Kingston in October 1847.

McLean, J.—By the act 9th Vic. ch. 75 sec. 13, the qualification to entitle a person to be elected alderman in the City of Kingston is declared and that qualification is continued by 12th Vic. ch. 81 sec. 208, until some act for the regulation of assessments should be passed in parliament, and further continued to the 21st December 1851 by the 17th sec. of the act passed 13 & 14 Vic. ch. 64. The qualification under 12th Vic ch. 81 can therefore only come into operation on and after the first day of January next.

By the act 9th Vic. ch. 75, sec. 13, it is provided that no person shall be eligible to be elected an alderman of the City (Kingston) unless he shall be a resident householder within the city or such part of the adjacent County of Frontenac as may be distant not more than three miles from the Market Square of the said city for four years *next* before the election; and it also describes the amount of property qualification which is necessary to be possessed to be eligible.

The question then in this case is simply, was the defendant a resident householder within the City or any part of the adjacent County of Frontenac not more than three miles from the Market Square for *four* years *next* before the election, held 6th and 7th January 1851.

The affidavit shews that in 1846, and up to October 1847, the defendant was resident in Montreal, so that for the *four* years *next* before the election he was not a resident householder as required by the statute, and therefore was not eligible to be elected as alderman in any ward in the City of Kingston.

I do therefore order and adjudge the election of John Shaw, the defendant, for Cataraqui Ward in the City of Kingston, an the 6th and 7th days of January last as void, and the same and the return of the said John Shaw as alderman for the said ward is set aside ; and I do order that the said John Shaw do pay all costs of the relator in prosecuting in the matter.

KEELEY ET UX. V. RAILEY AND FINLAY V. RAILE.

Action against magistrate—14 & 15 *Vic. ch.* 54.

Two actions were brought against a justice of the peace for trespass and false imprisonment. On the 30th August 1851 a verdict for plaintiff was found in one case of 2*l.* 10*s.*, and in the other of 1*s.*

Held, that the stat. 14 & 15 Vic. ch. 54 applied ; and no tender of awards being made or pleaded, plaintiff was entitled to his full costs in both suits.

These were actions for trespass and false imprisonment, brought against defendant as a justice of the peace. In the first of them the plaintiff recovered 2*l.* 10*s.* ; in the second 1*s.* The learned Chief Justice of the Common pleas, who tried both causes, did not certify at all, for any purpose, at or after the trial. Judgment was entered and full costs taxed in each case, and the defendant moved to stay taxation.

The judgments were entered recently, and copies of the bills of costs taxed were annexed to the affidavit on which each summons was granted.

The affidavits stated that the actions appeared to be brought against defendant as a magistrate, and for acts done in his magisterial capacity ; the amount of

the verdict, for which and full costs of suit, judgment was entered, and that deponent believed the defendant was entitled to the protection of the stat. 4 & 5 Vic. ch. 26, and that no costs should have been taxed to plaintiff without a certificate of the judge who tried the cause, under that statute.

In answer an affidavit was filed, with copies of the pleadings, which shewed that the writs were sued out on the 30th August 1851: that the action was trespass and false imprisonment, and not guilty by statute pleaded.

The affidavit also stated facts sufficient to shew that the defendant was tried for proceedings taken by him as a magistrate, but which were clearly wrong and void, and so the plaintiff in each case had a right, strictly speaking, to demur. But under what statute the defendant was proceeding, whether under the 4th & 5th Vic. ch. 26, as suggested, or under ch. 25 or 27 of the same year, or under any other act, or at common law, nowhere directly appeared on the papers before the learned judge in chambers.

Draper, J.—I infer from the affidavit filed by the plaintiff that the defendant professed to be exercising a summary jurisdiction conferred by statute, as a conviction is said to have been given in evidence, though unavoidably as a defence.

Then, the actions having commenced on the 30th of August last, it must be considered that on that day the 14th and 15th Vic. ch. 54 was passed, which repeals so much of any act as confers any privilege as to notice, limitation of action, or as to *amount of*

costs, or as to pleading the general issue and giving the special matter in evidence, or as to the venue, or as to tender of amends or payment of money into court, upon any magistrate, &c., for any act done by virtue of his office or under the provisions of any such act, except as to any action, suit or proceeding which has been commenced or prosecuted before *the passing of this act.* The 3d sec. enables a justice to tender awards and to plead such tender in bar, with the plea of not guilty or any other plea; and if the amount tendered be found sufficient, verdict is to be for defendant; but if insufficient, or no tender was made, and the other issues are found against defendant, or if verdict be against defendant where no tender of amends is made or pleaded, then defendant is to have a verdict with damages "*and the plaintiff shall have his costs of suit.*"

I think as the writs were sued out on the same day that the act was passed, the actions cannot be said to have commenced or prosecuted *before* the passing of the act, but must be governed by it. Then no tender of amends being made or pleaded, and the issue on not guilty being found for plaintiff in each case, costs will follow according to the ordinary rules of law. In the verdict for 2*l.* 10*s.* costs would follow of course; and in the verdict for 1*s.* the same would happen for the imprisonment unless there were a certificate under the 43rd Eliz.

I think, therefore these summonses must be discharged.

Brown v. Goodeve et al.

Service of amended declaration, without payment or tender of costs, as ordered by rule granting amendment—Waiver—special agency—Rule of court.

The action was brought in the county of Lincoln; defendant resided at Cobourg; and proceeding were carried on in the office of the Deputy Clerk of the Crown at Niagara. Defendant had no booked agent in the office at Niagara, and demurred to the declaration, employing L. as agent, to file and serve the demurrer, but, as he swore, no further. Leave to amend on payment of costs being granted, plaintiff served his amended declaration on L. without tendering costs; L. transmitted it to defendant, who neglected to plead, and plaintiff signed interlocutory judgment. Defendant subsequently tendered pleas through L., which were refused; *and held* that the service of the amended declaration and subsequent proceedings must be set aside with costs, for irregularity—the transmission by L. to defendant of the amended declaration being no waiver.

The application was to set aside the amended declaration in the cause and all subsequent proceeding, on the ground that the costs payable under the order for leave to amend were not paid or tendered before the filing of the amended declaration.

It appeared that the original declaration was demurred to, the action being brought by the plaintiff's attorney in the county of Lincoln, the defendants and their attorney residing at Cobourg, and the proceedings carried on in the office of the Deputy Clerk of the Crown at Niagara. The defendant's attorney at the time of the service of the demurrer by him, and afterwards when the application was made to amend proceedings, had no booked agent in the crown office in compliance with the rule of the Court. He employed an attorney at Niagara to file

and serve the demurrer for him there upon the plaintiff's attorney; and in his affidavit, filed on his application, he swore that Mr. Lawder (the attorney at Niagara) was not his agent, any more than that he sent to him the demurrer to be filed and served. The plaintiff's attorney filed the amended declaration on the 20th of March, and served a copy of it on Mr. Lawder, but it did not appear that the costs were offered to be paid to him. On the 19th March a copy of the amended declaration was posted up in the crown office in Toronto, in consequence of the defendant's attorney not having any booked agent.

The costs were taxed *ex parte* for the same reason, the service of the order for leave to amend being made by posting it up in the crown office on the 18th March.

No pleas having been filed, interlocutory judgment was signed on the 24th March, and subsequently Mr. Lawder offered to serve pleas for the defendants' attorney, but they were refused.

BURNS, J.—From the defendants' letters it would seem that the case is really without any merits; but of course, if the plaintiff has been irregular in his proceedings, and if the defendants have not waived their right to complain, I cannot deny them the effect of what they ask. The service of the amended declaration by posting it in the crown office in Toronto could not avail, because that was done the day before the declaration was filed. The taxing the costs appears to have been quite regular; and I am

of opinion that the service of the amended declaration on Mr. Lawder was sufficient if the costs had been tendered to him. The defendants' attorney says that Mr. Lawder was not an agent for him further than to file and serve the demurrer. If this were so, then Mr. Lawder should not have received the declaration when it was served on him; and I cannot do otherwise than believe that Mr. Lawder transmitted it to his principal, for the defendants' attorney swears (without however saying from whom) that he received the declaration by post. Again: Mr. Lawder is employed to serve pleas to the amended declaration.

According to the rule of court M. T. 4 Geo. IV. where the attorney resides without the district where the action is brought, services will be deemed regular by being put up in the crown office in the district wherein such action is brought, unless such attorney have a known agent in the same district; in which case service on the agent shall be required. This rule is quite independant of the rule respecting booked agents in the principal office. I do not see that the service of the amended declaration could have been otherwise made than upon Mr. Lawder, unless, indeed, he had informed the plaintiff's attorney that he was only employed to serve the demurrer; and then in such case the service might have been made by the copy being put up in the crown office at Niagara.

The difficulty on the plaintiff's part is, that he obtained a conditional order, and he has not complied

with it. Before his declaration can be treated as amended he must have paid the costs. I know of no authority for paying costs to the master; but the rule must be with them as in other cases, that they must be paid or tendered to the person entitled to receive them, or to his legal agent. In this case the costs were not paid or offered either to the defendant's attorney, or to Mr. Lawder. I do not see that Mr. Lawder, having received the declaration and forwarded it to the attorney, waived the right to have the costs. The order to amend being upon payment of costs, it is a condition precedent on the party obtaining the order to see that it is fully complied with. The costs should, in my opinion, have been tendered to Mr. Lawder with the amended declaration; and I think the plaintiff could not properly sign judgment until he first ascertained whether the defendants waived their right to the costs.

The amended declaration, and all subsequent proceedings, must be set aside with costs.

Reg. ex Rel. Mitchell v. Rankin & Dunlop.

Election for township councillors—Qualification of voters—Power of returning officer—12 *Vic. ch.* 81—14 & 15 *Vic. ch.* 109.

A vote which the returning officer received and entered in the poll book, appeared subsequently to have been wrongly received, and the returning officer struck it out, which produced an equality of votes for the candidates, and the returning officer gave the casting vote.—It appeared that other votes had been improperly received, which being struck out, the candidates would still be equal.—*Held*, that

the returning officer had no right to strike out a vote he entered in the poll book, and that under the circumstances the returning officer's vote should not be allowed still to decide the election—but that there should be a new election, and that the returning officer should pay the relator his costs.

The relator complained of the election of James Rankin to the office of township councillor for the fifth ward of the townships of Dover East and Dover West; and also against Robt. Dunlop, the returning officer for the ward, on the following grounds:

First, that the returning officer erased a vote from the poll book, of his own will, upwards of three hours after the vote had been recorded and polled for the relator.

Secondly, that the returning officer received votes for the defendant Rankin, from persons not resident in the ward, whose names were not upon the attested copy of the collector's roll.

Third, that the conduct of the relieving officer was grossly partial in favour of the defendant Rankin, and that he used all his influence to prevent the relator from being returned.

Fourth, that a majority of good and legal votes were recorded for the relator, and he ought to have been returned.

The relator claimed to be seated. The poll book was returned from the township clerk's custody by order of a judge, and the returning officer annexed to his affidavit the attested copy of the collector's roll with which he had been furnished. The returning officer does not himself make any affidavit of the circumstances under which the votes were received

and recorded, or of the striking out the vote recorded for the relator. At the close of the poll the votes were found equal in number, for each candidate and the officer polled his vote for the defendant Rankin. The vote struck out of the poll book was that of Robert Angus. It appeared that he was the sixth person in order of time who voted for the relator. From the affidavit of William Bishop, made on behalf of the defendant, it appeared that Angus was objected to at the time he gave his vote on the ground that he was a non-resident of the ward and his name not upon the roll, and the returning officer was inclined to reject him; but the relator insisted that his vote should be recorded, inasmuch as he had property which qualified him. His name was then recorded, and he voted for the relator. Bishop swore that the returning officer remarked at the time that the vote would be liable to be cancelled if found to be incorrect. Bishop swore, and others also did, that on behalf of Rankin it was insisted that as the returning officer had received Angus's vote and also another of a similar description, he should receive similar votes for Rankin, but he refused to do so, being convinced on the production of the act of parliament that he had done wrong; and he, the returning officer, insisted that he had power to correct his first error by erasing the vote of Angus, which left the two candidates equal, and then the said Robert Dunlop gave his casting vote for Rankin.

Burns, J.—It seems pretty clear that Angus's name was not removed from the book till the

returning officer summed up the votes, and then by striking out that name he produced the equality in numbers. It does not appear to be the case of a vote inadvertently put down, while the discussion was being preceded with whether it should not be received, neither is it the case of a mistake of the vote being put down for one candidate while it should have been put down for another. The returning officer had, though erroneously, received the vote and recorded it, and had fully exercised his judgment. Though he discovered afterwards that his judgment was wrong, he had no right of his own will, or at the instance of Mr. Bishop or any other person, to alter or change the poll book, and it was his duty to have proceeded with the election till the electors themselves might have made the change in numbers by their votes. The returning officer acted illegally in removing the name of Angus from the poll book.

The defendants urge that Angus had no right to vote, and therefore it is after all right that his vote should be struck off. It is sworn that he was a non-resident of the ward, and his name is not on the collector's roll, and therefore it is established that he was not qualified. This would render the two candidates equal. The relator complains, however, of two votes received for the defendant as being illegal, that of George Williams and that of Alexander Lozo; Williams not being a resident of the township, and Lozo not being on the collector's roll. Neither of these votes are attempted to be supported, and upon

reference to the collector's roll neither of the names are upon it. These should be removed, and then, after deducting Angus's vote, the relator would have a majority of two, not counting the vote of the returning officer. On the part of the defendants two of the relators votes are objected to—Kenneth Henderson and Peter Chalmers. It is clear that Henderson had no right to vote, and his name should be removed. The objection to Chalmers is that he was not a freeholder or householder. His name is upon the township roll, but in what character does not appear.

Bishop swears that he hath reason to believe and does believe that he is not a freeholder, and that he hath reason to believe and doth believe that he lives with his brother, and not in a separate house of his own.

Michael Owen swears that he has known Chalmers for the last fourteen years, and for the six years preceding the election he has lived with his brother, and is still residing with him ; and he says that about the first day of January Chalmers told him that he had been advised to build a fire and eat and sleep in his house (which Bishop says was used as a stable before that) in order to entitle him to vote.

John Chalmers, the brother of Peter, swears, that both Peter and himself have resided with their brother for the last six years, and that Peter had no other place of residence, and he swears he believes Peter is not a freeholder, and thinks it impossible that he could have become so without the depo-

nent's knowledge. It appears that Chalmers was objected to, but he does not seem to have been sworn. The oath which the voter is required to take, as stated in the 122nd sec. of ch. 81 12 Vic. does not require swearing to a property qualification; but nevertheless, the voter should be taxed either as a freeholder or as a householder, and that ought to appear. The copy of the roll furnished to the returning officer shews that Peter Chalmers is rated for 140*l.* 15*s.* but what description of property is not stated. I have seen other rolls furnished by collectors to returning officers in a defective state, and I now take occasion to mention the subject, that in future it may be corrected. The last act 14 & 15 Vic. ch. 109. sched. A. No. 4, requires the returning officer to procure a correct copy of the roll, as far as the roll contains the names of all male freeholders and householders, rated upon the roll. The affidavit of the township collector attached to the copy furnished to the returning officer, sworn on the 2nd January, states that the list contains a true and correct copy of the roll for the fifth ward of the freeholders and householders, to the best of his knowledge and belief. The weight of the evidence, however, is against Peter Chalmers being qualified. The candidates would thus be reduced to an equality of votes upon a scrutiny, and the question then is whether the vote of the returning officer shall be allowed to decide the election. When I consider the conduct exhibited on the part of the returning officer, as sworn to on the affidavit of the relator, though in some

respects repelled by the affidavits on the other side, and his irregular conduct, as appears clear from the affidavits on his part, both in receiving votes and exercising a control over the poll book, it convinces me that I should not allow his vote under the circumstances to decide the election. And it is to be remembered that he gave his vote to decide the election under circumstances, which, but for the exercise of his erroneous judgment ought to have compelled him to have returned the relator, even though he might suppose he could not retain the seat.

I think the defendant Rankin should be removed, and that there should be a new election, and I look upon the conduct of the returning officer as illegal and improper; and, having clearly struck off the vote for the express purpose of himself deciding the election, he should, I think, pay the relator his costs. I give no costs to the defendant Rankin.

REG. EX REL. ARNOTT V. MARCHANT AND LUDDINGTON.

Service of summons in the nature of quo warranto—Costs 12 *Vic. ch.* 89—13 *&* 14 *Vic. ch.* 64.

Personal service of a writ of summons in the nature of a quo warranto cannot be dispensed with, except in the case provided for by the act 12 Vic. ch. 81, sec. 148.

The power of a judge. under 13 & 14 Vic. ch. 64, schedule A. No. 23, to award costs for or against the relator, or defendant or returning officer, "in disposing" of every case, extends only and has reference to, the FINAL determination of each case.

The relator complained against the election of

James Marchant as township councillor for the fifth ward of the township of Blandford, and against Tracy Luddington, the returning officer.

The writ had been properly served on Luddington, and he now appeared; but the service had not been personal on Marchant, and he did not appear. There were two questions presented upon these facts before the merits of the election could be inquired into. First, whether personal service could be dispensed with, except in the cases provided for in the statute; and secondly, whethor the hearing of the matter upon the complaint could be proceeded with as against the returning officer before disposing of the question, the inquiry into which was invited by the writ of summons.

The person who went to effect the service upon Marchant, swore, that on the 15th February he went to Marchant's house for the purpose of serving the copy of the writ of summons and other papers; that on making inquiry of Marchant's wife and other members of his family, he ascertained Marchant was there in the house, but dangerously ill and could not be seen, and then he served Marchant's wife with the necessary papers, which she took.

The affidavit of service was made on her the 21st February, and the deponent swore that Marchant then was still dangerously ill, as he was informed and believed, and that it would be impossible to make personal service.

The deponent swore that he on the 17th February again went to Marchant's house, and inquired for the

papers, and he was informed they had been sent to John Barwick, Esq., the township reeve, to be attended to.

BURNS, J.—The statute requires the writ to be personally served, except in such cases as provided for, and the excepted cases are where the parties against whom the writ shall be brought shall keep out of the way to avoid personal service, in which case it shall be lawful for the judge, upon being satisfied upon affidavit, to make an order for service in some other manner. In other process of the court requiring personal service it is not absolutely required that a delivery of the paper shall actually be made to the hand of, or upon the person of the defendant, but if what takes place be such as is equivalent to that, there the service is deemed to be personal. Less strictness was allowed formerly than now. The cases of Rhodes v. Innes, 7 Bing. 329; Phillips v. Ensell, 2 Dow. P. C. 784; and Williams v. Piggott, 1 M. & W. 574, had considerably relaxed the rule as to what should be considered personal service. In Goggs v. Lord Huntingtower, 12 M. & W. 503, Baron Parke says, that in consequence of these decisions, the judges had come to a determination that in future there shall be no equivalent for personal service, and in that case—one almost as strong as a case could be for believing that the writ had come to the hands of the defendant—the court held the service insufficient. The same strictness has been since followed by Mr. Justice Wightman in two other cases—Heath v. White, 2 Dow. & L.

46, and Christmas v. Eicke, 5 Dow. & L. 156. I do not think I can in this case hold the service to be equivalent to a personal service.

With regard to the returning officer, who is made a party to these proceedings, the inquiry can only be with a view to disposing of the costs of the proceedings. The 146th sec. cap. 12 Vic. ch. 81, as amended by chap. 64 of 13 & 14 Vic. Schedule A. No. 23, enacts, that "in all cases it shall and may be lawful for such judge, if the facts in evidence before him render it proper so to do, to make the returning officer at such election a party to such proceedings, by a writ of summons to be served upon him for that purpose, in the same manner as the writ of summons hereinbefore mentioned. And it shall and may be lawful for such judge, and he is hereby required in disposing of every such case, to award costs for or against the relator or defendant, upon such writ, or for or against the returning officer, when he shall so be made a party to such proceedings, as to such judge may seem just." The question upon these words is what meaning is to be attached to the expression *in disposing of every such case.* I think it must mean the final disposition of the case, which the relator brings before the judge, and cannot mean a disposition of it piecemeal. It is evident the object which the legislature had in view in enabling the judge to make the returning officer a party to the proceedings was, that costs might be imposed upon him in case he were the cause of illegal proceedings, if the judge should think proper to inflict them. The

proceeding against the returning officer I take to be an adjunct to the principal matter—that is, the inqury as to the validity of the election of the defendant as township councillor. I can make no inquiry as against Marchant until he is either before the court or is in a position that the case can be dealt with in his absence. A case might happen in which it would be proper not only to give the relator his costs against the returning officer, but also to make the returning officer pay the costs of the other defendant; and if a preliminary inquiry can be gone into before the principal defendant is in court, for the purpose of determining the costs *quoad* the proceedings as far as they have gone, it might lead to great difficulty, and at times to injustice.

The case therefore must stand over as respects the returning officer, in order that either personal service or service in the mode prescribed by the act be effected upon Marchant.

In re Charles v. Lewis & McMahon.

Election for Township Councillor—14 & 15 *Vic. ch.* 169, *sch. A.*—*Qualification for a voter*—*Copy of collector's roll not furnished to returning officer.*

The copy of the collector's roll, which, by 14 & 15 Vic. ch. 109, sch. A. No. 12, should be furnished to the returning officer, is not conclusive upon a judge when objections are made to the qualification of voters.

A party (the gaoler) who lived in apartments in the county gaol, paying no rent, and being lessee of land rated at the annual value of 10*l.* 4*s.*, was held not entitled to vote at the election of councillors, as not being a householder within the meaning of 14 & 15 Vic. ch. 109, sch. A. No. 12.

Where the returning officer was not furnished with a copy of the collector's roll, as required by 14 & 15 Vic. ch. 109, sch. A. No. 12: *Held*, that it was an irregularity which subjected the election to be avoided, when the objection was taken by one qualified to urge it, although it might not *ipso facto* render the election void: and *Held* also, that the acquiescence of the candidates in the election being proceeded with under the circumstances, though it might preclude them from disputing the validity of the election on that ground, could not affect the right of a voter who was no party to such acquiescent arrangement.

The defendants were declared as duly elected councillors for St. Patrick's Ward in the town of Goderich, and the return was complained against upon two grounds: *first*, that William Robertson, who voted for the defendants, had not by law any right to vote at all at the election; and *secondly*, that that the election was not duly held according to law. The reason why only one voter was objected to was, that if that vote were removed the candidates opposing each other would have an equality of votes, and then it would have remained for the returning officer to decide the election. This position of the relator was met by the defendants' objecting to a voter who voted for the candidates opposed to them, he not being resident within the ward in which his vote was recorded. The defendants produced a copy of the collectors roll, verified by the oath of the collector for Goderich, sworn on the 10th Feb. inst., by which it appeared that William Robertson was rated in St. Patrick's ward for real estate of the annual value of 10*l.* 4*s.*; and upon this, it was argued, that the collector's roll so appearing it was conclusive.

BURNS, J.—I have already expressed my opinion that the roll, or rather copy, which should be furnished to the returning officer is intended to be *prima facie* a guide for him at the election; but it most certainly is not conclusive upon the judge when voters are objected to as not qualified to vote, or in any case where a scrutiny must be had. Robertson, it appears, is the lessor of the land, and he himself resides with his family in apartments in the gaol, being the gaoler of the county-gaol. There is no dwelling-house on the land for which he is rated; a stone building is erected thereon, which is used for storing hay and grain. By stat. 14 & 15 Vic. ch. 109, sch. A. No. 12, the voters in towns are declared to be those who are freeholders and householders, whose names shall have been entered on the collector's roll for the year next preceding the election, rated for ratable real property held in their own names or that of their wives respectively, as proprietors or tenants thereof, to the amount of 5*l.* or upwards. Robertson is not a householder according to the meaning of the term in this act, for it certainly here means a person as being the head of a family, actually keeping house in the ordinary sense of these words. He lives in apartments in the gaol, paying no rent, and in no way having a control as one has in his own house, but subject entirely to the will and control of others. The words *proprietors* and *tenants* do not mean persons who may have leased lands without houses, of which it may be said they are for the time being proprietors, or under

their leases they are tenants. The words are used synonymously with *freeholders* and *householders*, and the whole taken together means this,—that a freehold assessment to 5*l.* and upwards gives the right to vote, and in all other cases the voter must be a householder, though he may be such of a house which is his own, by whatever title he may hold it, as well as though he rented subject to the definition of householder as personally applicable to him. The provisoes in the clause make that view clear to me; and though this does exclude leaseholders of lands merely, yet as the legislature has confined the privilege of voting to residents of the locality, who are either freeholders or householders, we must suppose the words were used in the sense in which they had been understood previously, and I see nothing in the act to prove that any extended meaning should be given to them. I am of opinion that Robertson had no legal right to vote on the property rated, and his vote should be removed. Then, as to the vote objected to by the defendants, if the election were to be decided upon a scrutiny—it would be right to afford the relator time to support the vote if he could, because he is only for the first time made aware at this hearing of the case that it is necessary to support the votes against the defendants. If it be true as stated, that the voter was a non-resident of the ward, then his vote could not be sustained; but it would be of little use to keep the matter open in respect of that vote, if the election be void upon grounds independent of a scrutiny. The objection set forth

in the relator's statement is that the election was not conducted according to law. This, it is argued, is not sufficient, and that the defendants should not be called on to answer so general a charge. If this charge were intended to be applied to the merits of the election, as respects the candidate themselves, or of individual voters, or of something complained of during the election, admitting its inception to be legal, then, though the evidence did disclose a sufficient case to give effect to the relator's complaint, yet I might think it right not to interfere. The 9th rule of both courts on the subject of these elections declares, that notwithstanding the relator shall not be allowed to proceed on grounds not specified in the statement, the judge may in his discretion entertain any substantial ground of objection to the validity of the election which may appear in the evidence before him. The objection to the validity of the election is, that before the election was held no copy of the collector's roll for the ward was furnished to the returning officer, verified in the manner directed by ch. 109, Sched. A. No. 12, of 14 and 15 Vic., and that the returning officer proceeded to hold the election without it. The point is clearly stated in the affidavit of Mr. Strachan, and in fact is not denied that such was the case. Mr. Strachan's affidavit is one of those which the defendants had particular notice was to be used at the hearing, and the defendants have now produced a sworn copy of the collector's roll, and otherwise replied to Mr. Strachan's affidavit. Mr. Strachan swears that on the day of the

election he met the collector, and spoke to him upon the subject of not having furnished the returning officer with copies of the roll, and that he stated he was unable to swear to the correctness of the roll, and therefore had not furnished the copies. Why he should not be able to swear to the correctness of a copy which it was his duty to make of a roll handed to him simply to collect the rates upon, does not appear. The collector has however now, in answer to this application, made an affidavit swearing to the correctness of the copy of the roll for St. Patrick's ward, in which no notice whatever is taken of what Mr. Strachan has stated. Under these circumstances, I think the allegation in the statement is sufficient to permit me to exercise a discretion in determining the validity of the election upon the evidence.

The recent statute, I mean ch. 109 of 14 & 15 Vic., enacts that it shall be the duty of the returning officer to procure a correct copy of the collector's roll for the year next before the election, which copy shall be verified by the affidavit or affirmation of the collector, or such other person as may have the legal custody of the original roll for the time being, and also by the affidavit of the returning officer, to be appended to, or endorsed upon such copy, and states what the particulars shall be which such affidavits shall contain. It is argued that, because the different candidates assented to the election being proceeded with and being determined, there is an acquiescence which prevents an inquiry into the circum-

stances under which the election was held. Such a fact might and would, perhaps in most cases, disqualify a candidate from disputing the validity of an election, where he had made no protest against pro ceeding, but it cannot disqualify a voter who is no party to an acquiescent arrangement or understanding if such term be applicable to the matter, and he may complain of the illegality notwithstanding that the candidates may have agreed not to do so. I do not mean to be understood that the want of such verified copy of the collector's roll, *ipso facto*, renders the election void in such a sense as that it may be said the person said to be elected is a mere pretender, but in my opinion the want of such verified copy is an irregularity in the holding of the election which subjects the election to be avoided, when the objection is taken by one not disqualified from urging it; and, being an objection which strikes at the validity of the election, effect should, I think, be given to it.

The defendants should therefore be removed from the office of town councillors, and a new writ to hold another election to be issued. Costs, I apprehend, must follow the decision, beeause the defendants were aware that the election was attacked upon a ground which was as open to them to be considered whether they would defend as it was to the relator whether he would persue it, and in such cases costs follow the legal results.

The Queen on the Relation of Porter Preston v. Alexander Preston.

Election of Township Conncillor—12 *Vie. ch.* 81—13 & 14 *Vic. ch.* 64—*Quo wararnto*—*Costs.*

One Robert Gillis had a farm, through which ran the division line between Wards Nos. 2 and 3. His house stood on that part of the farm included in Ward No. 2, but his barn on the part in Ward No. 3. The Township Municipality passed a by-law that the election of Township Councillors for 1852 "for Ward No. 3" should be held at *Robert Gillis's Held*, that the by-law must be read as meaning on some part of his property in Ward No. 3, as otherwise it would be void. 2ndly. That as the election took place in the house, it was null, being without the limits of the ward. 3rdly. That relator was not by his quasi acquiescene precluded from subsequently raising the objection.

A summons was obtained in the nature of a *quo warranto* to set aside defendant's election as town councillor for the third ward of the township of Manvers, in the county of Durham. Two objections were raised: 1st,—That the election was held and all the votes were taken at a house not within the limits of the ward number three, but a few rods within the limits of the adjoining ward number two. 2nd,—That the returning officer was disqualified, as he was auditor, collector, and inspector of licenses in the township.

The township had been divided into several wards, under the 12 Vict., chap. 81, sec. 3, and in Dec. 1851 the township municipality of Manvers passed a by-law, by which, among other things, it was provided that the election of the township councillors for the year 1852, "*for ward number three, shall be held at Robert Gillis's; returning officer, Archibald Baird.*" Robert Gillis had a farm, with a

house and barn upon it. The division line between wards Nos. 2 and 3 passed through this farm between the house and barn, the house being in ward number 2, and the barn seven or eight rods distant, in ward number 3. At the opening of the election the relator objected to the returning officer holding it at the house, because it was not within the ward number 3. The returning officer, according to the defendant's affidavits, expressed his readiness to go to the barn, at the same time asking the relator whether if he obtained a majority of votes at the house, he would not consider himself legally elected, and the relator replied he would. That after some further conversation the election went on at the house without further objection, and was continued until 2 or 3 in the afternoon of the second day—the relator taking part in the election to the close of the poll.

DRAPER, J.—As to the first objection, the fact is clear. The election was not held within the limits of the ward, and the only question seems to be, whether the relator has by his own conduct precluded himself from raising the objection.

The by-law of the township council appointing the place for holding the election is passed under 12 Vict. chap. 81, sec. 9, which authorizes them "to appoint a fit and convenient place in each of the several wards into which such township shall be divided for holding the election of township councillor therefor." The 5th section also expresses that the place for holding the election shall be in the ward. The 19th section also confirms the view that the legis-

lature meant the elections to be held within the limits for which the representatives were to be chosen. I think it must be assumed that the by-law was intended to be in conformity with the statute, as its language will bear such a construction—though the more obvious meaning would be, that "at Robert Gillis's" means "at the house of Robert Gillis." But, as the meaning would make the by-law contrary to the statute, and therefore void, in my opinion such a construction should be given, if the facts will permit it, as will be in compliance with the statute, and give effect to the by-law, which can be done by treating the words, "at Robert Gillis's" as meaning at some part of his property within the ward number three.

If the language of the by-law would not permit any such construction, then I should be constrained to hold that it was entirely inoperative and void in this particular, as directing a thing contrary to the clear language of the statute.

In either case, I think it clear that the election could not lawfully be holden at a place without the limits of the ward for which a councillor was to be returned, and therefore this election is contrary to law.

I should have been very glad if I could have held that the conduct of the relator would justify me in treating him as precluded from raising the objection. Undoubtedly there are many cases in which such a course is sanctioned both by reason and authority; but here there is an infringement on the letter and

spirit of the act. If the election can be held anywhere out of the ward, it might be held out of the township; I can find no line to be drawn—depending on a distance of a few rods, or a mile or a greater distance. It might happen that where a ward was only separated from an adjoining township by a road, that in the adjoining township, close to the road, there should be a barn, or school-house, or some building much more convenient for holding the election than any within the ward. If the present election can be upheld, so might one held in the adjoining township. I think, beyond doubt, that this is in contravention of the act, and renders the election itself null; and, though there is no merit in the relator's conduct in the matter, I think that his acquiescence will justify my treating this as a valid election for any purpose, even as against him.

As to the second objection: it was admitted during the argument that there was nothing in the statute to support it. I have not seen anything to induce me to think it valid. But I do not feel it necessary to make any observation on it, as I am of opinion that on the first objection the election must be set aside and a new election be ordered.

If I had the power, I would withhold costs from the relator; but sec. 146 of 12 Vict., chap. 81, as amended by 13 & 14 Vict., chap. 64, Schedule A., No. 23, does not seem to leave the question of costs discretionary in this instance, as it does in the case of a disclaimer.

Ex rel. Hawke v. Hall.

Election of township councillors— Disclaimer—Costs—12 Vic. ch. 81, 13 & 14 Vic. ch. 64.

The defendant filed a disclaimer, but a day too late; and *held* that he must pay the relator his costs.

The returning officer having by order of a judge become a party, but acquitted and discharged; and relator's statement not being strictly correct: *Held*, that the relator should pay the officer his costs.

Previous to the stat. 14 & 15 Vic. ch. 109, it was not necessary that it should appear on the collector's roll whether the persons therein named were freeholders or householders.

In this case the relator complained of the undue election of the defendant as township councillor for the rural ward No. 5, of the township Wellesley; and claimed himself to have been duly elected to the said office: the grounds stated on his relation were:—

1st,—That a person named Andrew McKennett was recorded in the poll book as having voted for Josias Hall; whereas the said Andrew McKennett did not vote at the said election, as he was on the day of the said election absent many miles from the township of Wellesley.

2nd,—That the poll book shewed that one James Wray voted for Josias Hall; whereas the said James Wray did not vote at the said election.

3rd,—That the poll book shewed the name of Andrew Love recorded as having voted for Josias Hall; whereas the said vote was recorded in favor of the relator; and the returning officer, upon the representation of persons acting for the defendant, *without* the consent of the relator, altered the record of the said vote, by recording the same in favor of the defendant—he the said Love not being present.

4th,—That the said poll book shewed the name of John Kennedy as having voted for the defendant; whereas the *assessment* roll shews that John Kennedy was rated as the occupant of lot 8, 9th con.; whereas he was neither a householder or freeholder, nor yet does he appear on the roll as such.

The same objections were stated as to the vote of William Heron, rated as the occupant of lot 2, 10th concession.

The same objections were stated to the vote of Ephraim Case, rated as the occupant of lot 1, 11th concession.

The same objections were stated to the vote of Hugh Crooks, rated as the occupant of lot 12, 11th concession.

The same objections were stated to the vote of James McGee, rated as the occupant of lot 9, in the 14th concession.

The same to the vote of George Parker, rated as occupant of lot 5, in the 11th concession.

None of these being freeholders or householders.

5th,—The vote of Frederick Warwicke was objected to on the ground of alienage.

6th,—That thirteen votes of the defendant's were bad, as above shewn; and that the defendant was returned as having forty-seven votes; whereas the relator was returned as having forty-six votes, and is therefore entitled to be elected.

The relator, by affidavit, swore to the truth of the relation, filed 24th January.

The relator, by affidavit filed at the same time, swore that defendant intimated himself that he was a candidate at the election: that the returning officer admitted the votes of the parties before mentioned, rated on the assessment roll as occupants of land, but not as freeholders or householders; that the returning officer on 5th January received a vote for deponent from Andrew Love, but next day, at the suggestion of friends of defendant, altered the poll-book, because the said parties alleged that the vote was tendered for Hall, not for Hawke, (the deponent did not state here that the alteration was made without his assent, or that he made any objection): that the returning officer recorded a vote tendered by a person calling himself Andrew McKennett, the said Andrew McKennett being absent; that James Wray was returned as voting for Hall, whereas he did not offer his vote to the returning officer; and that Frederick Warwicke was an alien and not naturalized. The deponent did not say that he object to these votes at the time they were polled.

By order of Mr. Justice McLean, the returning officer was made a party.

At the return of the summons the defendant filed a disclaimer, according to the statute, but a day too late. He deposed by affidavit that he was not aware that any of the votes tendered for him were illegal; and that he did not know how to put in a disclaimer until he came to the City of Toronto, when he sent the disclaimer through the post office,

The returning officer now puts in the copy of the roll upon which he acted, identified by his affidavit, and sworn to by George Ballard, the township clerk, as a true and correct copy of the assessment roll for the township aforesaid for the year 1851, as far as regards the names of the freeholders and householders upon such roll.

The roll did not distinguish whether the persons named are freeholders or householders—the names, the number of the lots, and the assessed value only were stated. The roll was sworn to as containing a copy of the assessment roll as far as regards the names of the freeholders and householders upon such roll; and it was headed or entitled "Inhabitant freeholders and householders in ward No. 5, in the township of Wellesley," with the amount of the assessed value of real property for which they were respectively rated on the roll for the year 1851. All the names of the voters objected to as being *occupants* appeared on the roll, rated as either freeholders or householders, precisely in the same manner as the names of other voters appear.

The roll was not objected to as being insufficiently verified, or as being in any way insufficient.

The returning officer filed an affidavit stating that the voter Andrew Love appeared and tendered his vote for Hall; that through the neglect of deponent the vote was improperly put down for Hawke; that on the morning of the second day deponent pointed out the error in the presence of both candidates; that on reference to the check book kept by the

clerk of Pordpher Hawke, it was proved that the said vote had been taken down for Hall, and that Hawke consented to deponent altering the vote and recording it in favor of Hall.

That deponent recorded the vote of a person calling himself Andrew McKennett, which person was wholly unknown to deponent; and that he was not objected to or required to be sworn.

He gave the same explanation as to the person alleged to have personified John Wray; and that the name of Andrew Warwicke was recorded under the same circumstances.

And that no objection was made to the receipt of the votes of the persons alleged to be neither householders or freeholders. (See 12 Vic., ch. 81, sec. cxxii).

An affidavit was put in, sworn to by Andrew Love, deposing that he voted in favor of Hall the defendant; also an affidavit of the defendant's confirming the statement of the returning officer.

Sullivan, J.—To the main question, regarding the validity of the election, I cannot, in the face of the disclaimer of the defendant, declare it valid; and as to the next question, whether the relator should be declared duly elected, it seems clear that these votes were given wrongfully for the defendant, though for all that appears received innocently by him, and by the returning officer. One of these votes was an alien; two others appear to have been cases of false personation of absent voters; this is enough to turn the scale in favor of the relator.

As to the objection of the votes said in the statement of the relator not to be returned on the roll as freeholders or householders, the relator has failed—they seem all to be duly placed on the roll so as to entitle them to vote.

The 14 & 15 Vic., ch. 109, sch. A. No. 16, provides for the roll containing further particulars *in futuro*, but this would not affect the rolls for 1851.

As to the question of costs, the defendant has by his delay in transmitting his disclaimer made himself liable to costs, if the statute makes it imperative upon me to award them. If the disclaimer had come in time, then, as against a party consenting to be put in nomination, the statute 13 & 14 Vic., ch. 64, sch. A. 23, would leave the costs in the discretion of the judge or the court.

The same section in a foregoing part of it enacts as follows: "And it shall and may be lawful for such judge, and he is hereby required to award costs for or against the relator or defendant, or for or against the returning officer, when he shall be so made a party to such proceedings aforesaid, as to such judge shall seem just."

I should readily have declined awarding any costs in favor of the relator in this case, because his relation appears to me to contain false allegations, as well as suppressions of the truth; or against the defendant, because he is not proved to have been in fault, unless it be a fault to refrain from putting the oath allowed by the statute to his own friends and

voters. It was the laches of the relator which caused a wrong election in this case. Nevertheless, the statute does not provide a remedy for the defendant, who has acted *innocently*, and who is for the first time informed by the statement of the relator of the invalidity of the election. He may escape costs by an immediate disclaimer through ignorance of the law, arising from not referring to a plain and simple direction of the statute, intended for the information of unlearned as well as of informed persons—the defendant has had the misfortune of not transmitting his disclaimer in time. It is not for me to judge of his excuse or to extend the time of his disclaimer beyond the statute. Had he placed it within my discretion by disclaiming in time, I should have exercised that discretion in his favor by relieving him from costs. As it is, I must adjudge the costs of the relator in his proceeding against the defendant (exclusive of the costs of proceeding against the returning officer), to be paid him by the defendant.

As to the returning officer, I adjudge him acquitted and discharged of all matters and things laid to his charge. The statement of the relator, which made it the duty of the judge who granted the fiat for the writ of summons to order the returning officer to be made a party, is partly false; and, as to the remainder, there is a suppression of the fact that the relater himself did not object to the receipt of the votes, and did not require the oath to be tendered—as well as an absence of all knowledge of the returning officer of the fraudulent personation of two votes and the alienage

of a third: and there is also a suppression of the fact that the alteration of the vote of Andrew Love in the poll book was according to the truth and with the consent of the relator, and in accordance with the check book kept by his clerk.

I therefore adjudge that the relator do pay to the returning officer all his lawful costs arising from his being made a party to the proceedings in this case.

And I also adjudge that Josias Hall was not duly elected, and that he be removed, and that the relator be declared duly elected; and that he be admitted in place of the said Josias Hall.

REGINA ET REL. ARNOTT ET AL. V. MARCHANT.

Township councillor—Who eligible—12 *Vic. ch.* 81, *sec.* 132 *—Improper conduct of returning officer—Costs.*

A person holding the office of local superintendent of schools entitled to a salary to be paid by the county treasurer, is not disqualified from being elected township councillor by 12 Vic. ch. 81, sec. 132.

Where the returning officer improperly closed the poll, both candidates having at the time received an equal number of votes; and, when in the act of recording his own vote, a vote was tendered by an elector, (who had been present a long time without voting) for the candidate against whom the returning officer voted, which he refused to record: *Held*, that there should be a new election.

Held also, that under such circumstances the returning officer should pay the relator's costs, and also the costs of defendant, if he chose to exact them.

Quære, whether it would be proper for a judge in chambers under the above circumstances, to have ordered the name of the voters whose vote the returning officer refused to record to be entered on the poll book, instead of ordering a new election.

This was a complaint by the relator, David Arnott, as voter and elector, against James Marchant, returned as township councillor for the 5th Ward of the township of Blandford; and against Tracy Juddington, the returning officer; and claiming that George Alexander was duly elected, and should have been returned as the township councillor.

The grounds alleged were, 1st—That the poll was opened at 12 o'clock on 5th January, and finally closed upon 2 o'clock the same day. 2nd—That one or more votes recorded for Marchant were illegal. 3rdly—That one or more votes were tendered, which were good and legal votes, for Alexander, and were illegally rejected by the returning officer. 4thly—That at or about 2 o'clock of the said first day, Marchant and Alexander had received each fourteen votes, and then the returning officer illegally gave his casting vote in favor of Marchant, and returned him. 5thly—That at about two o'clock the returning officer illegally closed the poll, and refused to receive any more votes. 6thly—That several voters were present who would have voted for Alexander, and who offered and tendered their votes, and were rejected by the returning officer. 7thly—That Marchant was illegally returned as the councillor for the ward; and that Alexander ought to have been returned as duly elected.

The affidavits of the relator and others proved that the poll was closed at about 2 o'clock on the first day, and was not afterwards opened; that at that time the candidates had each fourteen votes, and

that the returning officer then gave his casting vote for Marchant. It is sworn that while the returning officer was in the act of recording his own name on the poll book, one John Gillespie, a voter, presented himself to vote for Alexander, and was rejected. A few minutes after the poll closed John Graham, a voter, presented himself for Alexander, and was refused; and that before three o'clock other votes presented themselves to vote, but were refused. It is further stated that one Cowan voted for Marchant and he was neither a freeholder nor householder in the said ward or the township, but had land which he held from the government and had no deed for it; that one Bonner, who is similarly situated (as regards land) to Cowan, but is a resident of the ward, tendered his vote for Alexander, and was rejected.

The application of the relator was opposed on these grounds, 1st—That Alexander was exempted from serving the present year, and that when he was nominated at the election he declined serving; therefore he could not now be seated under any circumstances; and further, that having so declined, the election must be treated as having proceeded upon the footing of there being but one candidate—namely, Marchant. 2ndly—That Alexander was disqualified, by reason of his being the local superintendent of schools—being paid a remuneration from the township funds; and this should be considered a sufficient reason not only to prevent Alexander from being seated, but also should be looked at as though he could not be a candidate at all, and conse-

quently there was in truth but one candidate—namely, Marchant.

Burns, J.—The affidavits fail to convince me that Alexander must be understood as having refused to take upon himself the office, if the electors should elect him. By the proviso of the 130 sec. no person who shall have served in any of the said offices for the year next before any such election or appointment, shall be obliged to serve or be sworn into the same or any other of the said offices, for the year succeeding such service. If a person who is nominated is not liable to serve, and claims an exemption for that reason, the returning officer would not only be justified in rejecting votes for such person, but I think it would be his duty to do so. Whatever Mr. Alexander may have said in his speech, it is clear the returning officer did not himself think that he intended to refuse the office, for he received votes for him as a candidate opposing Marchant, and himself voted in order to decide the election. This sufficiently evinces in what light the returning officer considered Mr. Alexander stood, and that puts an end to any further consideration of the first question raised by the defendants.

The next objection against Mr. Alexander is, that he was the local superintendent of schools, receiving payment from the township funds, and therefore by the 132nd section is disqualified to be a candidate. Mr. Alexander was chosen local superintendent for the township of Blandford and East Oxford, on the 28th January 1851, under statute 13 & 14 Vic. ch.

48, sec. 27, subdivision 3, and consequently, is an office, if that expression be applicable, of and under the county council. By the 30th section it is provided that the salary of the local superintendant is to be paid by the county treasurer. The 132nd section of ch. 81, 12 Vic., in saying that no person receiving any allowance from the township, county, village, town or city, shall be qualified to be elected, &c., must be read *reddendo singula singulis*; and it must be a direct receipt from the township, &c., and not so remote as receiving from the county treasury, which in its turn is supplied from the different townships. There is attached to one of the affidavits a copy of a resolution of the township council, that the sum of four pounds be paid to Mr. Alexander, as the local superintendant for the past year. It is not stated that Mr. Alexander has received the amount, and if he had, I do not see that it would make any difference—but it is sworn that he is entitled to receive the four pounds, besides any allowance from the county council. I can see nothing in any of the provisions contained in ch. 81 of 12 Vic. nor in the provisions of the School Act, 13 & 14 Vic. ch. 48, which obliges the township council to make any provision for salary, or remuneration, to the local superintendent; and I am at a loss to imagine for what purpose this sum was ordered to be paid.

It does not appear to me that Mr. Alexander was disqualified; and now it only remains to be considered whether, under the circumstances, he should be seated, or whether there should be a new election.

There is no doubt that the returning officer illegally closed the poll at about two o'clock of the first day's election ; and the only excuse offered for that is, that after the lapse of an hour after the fourteen voters on each side had voted, one Peat, who had proposed Mr. Alexander, asked the returning officer to close the election in order that the voters might proceed to some other business.

In the affidavits on the part of the relator, it was sworn that while the returning officer was in the act of writing his name on the poll book, John Gillespie offered and tendered his vote in favour of Alexander; but it was rejected by the returning officer, on the ground that no further votes would be received at the election. This is not denied in any way ; but it is attempted to be excused, by shewing that Gillespie was present from the commencement of the election to the close ; and he was urged several times by his friends to vote, but declined to do so. Without the vote of the returning officer, which was illegally polled, the two candidates would be even. Whether it would be proper now to add to the poll book, the name of a voter who is shown to have been present and tendered his vote, and the vote not questioned, I am not prepared to say, nor do I express any opinion upon it ; but under the circumstances shown, I apprehend it would resolve itself chiefly into a question of discretion, whether it should or should not be done: and in the present instance, I certainly should not exercise a discretion in favour of a voter who had

the opportunity of voting if he had pleased, but for some purpose he held back, which, of course he had a legal right to do. It is one question to insist on one's legal rights, and quite another to ask interference on the ground of discretion.

With respect to the other voters who came after the poll was closed, I could not add their names for the purpose of deciding the election, because, if there were electors who still had not voted, and would have voted for Alexander, so there may be others who would have voted for Marchant.

I think there must be a new election; and as all the irregularity, and the necessity for this application proceeds from the conduct of the returning officer, he must pay the relator's costs, and also the costs of the defendant Marchant, if he chooses to exact them.

DUNN V. BOULTON.

Power of judge in chambers over parties in interpleader suit.

An interpleader suit, in which the trustees of this defendant and this plaintiff were respectively plaintiffs and defendant, was arranged on the understanding that all costs, including the sheriff's fees, &c., should be paid to the plaintiff's attorney: the costs, except the sheriff's fees, were paid by an order on the trustees by their attorney, who stated that, as soon as the sheriff's fees were taxed, H., one of the trustees, would pay them. These trustees subsequently transferred all the property which this defendant had previously assigned to them to other trustees, the sheriff's fees still being unpaid; and H. swore that he was not aware of these fees being due until after the transfer. Plaintiff's attorney sued the trustees for the fees, but was nonsuited; and the judge in chambers declined to make an order for the trustees to pay them, considering he had no jurisdiction over them.

A summons was issued in this cause, calling upon Alexander Murray, Thomas D. Harris and Wm. Wakefield, to shew cause why they should not pay the plaintiff or his attorney 12*l.* 4*s.* 6*d.*, the amount of sheriff's fees and poundage in this cause, with the costs of this application.

The plaintiff had put a *fi. fa.* against goods into the hands of the sheriff, who thereupon levied on divers goods and chattels as belonging to the defendant. Claims were set up to the goods seized by various parties, among others, by Murray, Harris and Wakefield, who claimed as trustees under an assignment made to them by the defendant for the benefit of his creditors.

The interpleader order was made for an issue in which these trustees were to be plaintiffs, representing their own and the interests of the other claimants, and the present plaintiff was defendant, to try their title to the goods so seized.

The issue was made up and entered for trial three times. Once it was a *remanet*, a second time it was put off by the trustees, the plaintiffs in the interpleader suit, who paid the costs; and the last time an agreement was entered into for the settlement of his action on the following terms: that the defendant and another person should give their joint notes for a part of the plaintiff's demand; that the plaintiff should wait for three years before enforcing the residue (retaining all his securities); and that the costs of this suit, and of the interpleader suit, and the

sheriff's fees and poundage should be paid to the plaintiff's attorney.

The notes were given—the sum of 37*l.* 10*s.* was paid for the costs of the two suits; and the sum of 12*l.* 4*s.* 6*d.* was taxed as the amount due for the sheriff's fees and poundage. The costs were paid upon an order given upon the trustees by their attorney, who also stated that when the sheriff's fees were taxed, Mr. Harris, one of the trustees, would pay them. Some months afterwards the trustees transferred all the property assigned to them by the defendant to other trustees named by him; these sheriff's fees still remaining unpaid; and Mr. Harris swore that he knew nothing about these fees and poundage, and the claim for them, until after he and the other plaintiffs in the interpleader suit had made the transfer spoken of; and that they had parted with all of the defendants effects and property assigned to them—in which effects and property they had no other interest than as trustees for the defendant.

It appeared that recently the plaintiff's attorney instituted a suit in the Division Court against these three parties, for these fees, &c., and was non-suited. This application was made to enforce the payment.

Draper, J.—Upon the best consideration, I do not think I can make the order. Not that I entertain any doubt that the plaintiff has paid these fees and has a right to recover the amount from the defendant; but because I do not think I have any

jurisdiction over these parties as plaintiffs in the pleader suit (and certainly it is only in that character that I could interfere in the matter as against them) to compel them, under what appears before me, by an order made in this cause to pay the sum claimed. If the interpleader suit had been determined in favor of the now plaintiff, then the question of costs, &c., to be recovered by him, would have arisen; but as it is, however equitable and just the plaintiff's claim, I cannot, that I see, assist him. I must leave him to such other remedies of a more strictly legal character as he may be entitled to, to recover the amount.

Riddell v. Briar.

Service of summons in ejectment—Venue.

The county marked in the margin of a summons in ejectment is to be taken as the county where such writ was issued, and not as the venue laid in the cause.

It is not necessary to read and explain the purport of such summons to the party served.

This was an action of ejectment commenced under the act 14 & 15 Vic., ch. 114, by writ of summons issued from the office in Toronto, directed to the defendant, as of the Township of Burford in the County of Brant, one of the United Counties of Wentworth, Halton and Brant, seeking to recover lands described to be in the County of Brant. The summons in the margin was marked, "County of York, one of the United Counties of York, Ontario

and Peel;" and in the body of the summons the defendant was directed to appear in the office of the Clerk of the Crown, at Toronto. It appeared that the service of this summons was made on the defendant in the ordinary way summonses are served, and not read over to the defendant, or explained to him.

A motion was made to set aside the service of this summons on two grounds—1st. That stating a county in the margin of the summons is giving a venue, on the principle that the summons is in lieu of the declaration of ejectment; and in this case therefore the venue of the action is laid in the County of York, whereas the land sought to be recovered lies in the County of Brant: 2dly. That the service of the summons is incorrect, inasmuch as the statute enacts that the writ of summons shall be served in the same manner as a declaration in ejectment is at present served, and that it should be read and explained to the defendant.

Burns, J.—With respect to the first objection, I am of opinion that there is no analogy of the writ of summons to the declaration, so as to compel me to say that the county named in the margin of the writ must necessarily be taken to be the venue in the cause. I look upon the county in the margin as the county wherein the writ was issued, and not as the county wherein the cause must be tried. The recent act for regulating the mode of proceeding in the action of ejectment has abolished pleadings, and it has enacted that, in case an appearance be entered, the case shall

be at once considered at issue. The first section of the act declares, that all actions of ejectment shall be commenced by writ of summons in the same manner as other actions. Now, when we turn to the act 12 Vic., ch. 63, we find that the form of the writ of summons given contains no county named in the margin, but is directed to the defendant, describing his place of residence. The declaration follows upon such summons, and that would require to contain a county stated in the margin, according to the Rule of Court, No. 31, E. T., 5 Vic. The writ of summons however, in ejectment, must shew the county wherein the lands sought to be recovered lie, and the cause could be tried in no other county. In the form of the writ of summons prescribed by the legislature a county is supposed to be named in the margin, but I can see nothing which should induce me to believe that it was intended that such county should be the county where the cause was intended to be tried, but I should rather say that it was intended to be the county where the writ was issued—the seat of the seal of the court—as was formerly the practice in all writs issued under the seal of the court. No difficulty can arise by reason of the writ being spread out upon the Nisi Prius record, because the award of the venire should correspond with the county wherein it was stated the lands were situated; and if the award of the venire were to the county stated in the margin, that being different from the one wherein the lands were situated, the plaintiff would be nonsuited at any attempted trial.

As to the second objection ;—I do not think it is required that the summons should be read over and explained, or the purport of the summons and service explained. The second section of the Ejectment Act directs that the writ of summons shall be served in the same manner as a declaration in ejectment is at present served. I can see that a good deal of difficulty will and must inevitably arise upon such a loose expression as this is, unless the court can devise some means of avoiding it, under the authority given to make rules necessary to carry the act into better effect. I do not see, however, that the words of the act make nugatory the service in this case. The declaration in ejectment was never read over to the defendant or person upon whom it was served, or the purport of it explained ; it was the notice attached to the declaration which was required to be read and explained. The notice is now abolished, and it is declared that the writ of summons shall be served in the same manner as a declaration in ejectment. The meaning of that I take to be, that the summons need not be personally served, but may be served upon the tenant's wife, or such other person as upon whom a declaration in ejectment might have been deemed, according to the circumstances of the case, good service. In this case the service is personal on the defendant, and the only question is whether it should have been read over and explained to him. I think not, for the reason that it was not the declaration in ejectment, but the notice which was read and explained to the party served.

Hunt v. Ford & Park.

14 & 15 *Vic., ch.* 10—*Absent defendant.*

Where a suit is commenced under ordinary circumstances an alias process cannot be issued as against an absent defendant, under 14 & 15 Vic., ch. 10.

Semble, that in actions under the above statute (as in other cases), where the cause of action is within the county court, the plaintiff may proceed in the Queen's Bench, marking the papers "inferior jurisdiction."

This was an application to set aside an alias writ of summons issued against one of the defendants, as absent from the province, and founded upon a previous writ of summons, in which both defendants were described and proceeded against as resident within the jurisdiction of this court.

Draper, J.—The statute 14 & 15 Vic., ch. 10, was passed "*to provide a remedy against absent defendants.*" It enacts that proceedings may be *commenced* in law or equity against any person who, having resided in Upper Canada, is absent therefrom, having contracted debts or liabilities while in Upper Canada, or having real or personal property therein, "in the same manner and *by the same process* as if such person was a resident inhabitant therein;" that the *first process* or proceeding any such action shall be served personally on such absent person, or upon any agent or person having charge of any property, real or personal, of such person, in this province; that on the copy of the process or proceeding served shall be endorsed a notice to appear, in the form given in the schedule.

This enactment appears to contemplate that common law process shall issue in the form given by 12 Vic., ch. 63, which requires the defendant to appear in *eight* days after service, by that the effect of this summons shall be qualified by the notice. It might have been more consistent with the character of the process, and with the obvious intent of the legislature as expressed in 12 Vic., to have provided that the summons should be so far altered in form as to contain the actual time after service at which the defendant should appear, so that the writ should not command one thing and the notice signify another. The form of the summons seems to have escaped the attention of the framer of the act, who seems rather to have been influenced by a recollection of a non-bailable *ca. re.* and the notices endorsed thereon.

I cannot, however, say that the plaintiff has done wrong in obeying the literal directions of the act, and issuing the same process as if the defendant was a resident inhabitant in Upper Canada.

But, on the best consideration I can give the act, and I am by no means clear that I am right, it appears to me the latter act contemplates an action to be commenced under its authority as against an absent defendant, and not that a suit commenced under ordinary circumstances should, by an alias process, be converted into a suit against an absent defendant. This is not, as I think, what the legislature nave expressed, though probably, if the question had arisen, they would have authorised such a course.

I have not attached any importance to the objection that the suit was commenced in the inferior jurisdiction, not feeling it necessary to give judgment on that point; it is, however, my present impression that the statutes 14 & 15 Vic. ch. 10, and 13 & 14 Vic., ch. 52, sec. 1, taken together enable a plaintiff to sue an absent defendant in the superior court for such a cause of action as, but for the last mentioned act, would have been more properly confined to the county court, and to mark the proceedings "inferior jurisdiction," in order to avoid subjecting himself to the defendant's costs.

I think, therefore, the alias writ and the service thereof, as respects the defendant Ford, is irregular, and must be set aside.

Rose v. Cooke et al.

Change of venue—Application for, refused.

Where the number of parties to a suit is greater on one side than the other, the majority cannot have the venue changed to the county in which they reside, (not being that in which the cause of action arose), because they are to be examined as witnesses on their own behalf.

This was a special application to change the venue from the united counties of York, Ontario and Peel, to the united counties of Stormont, Dundas and Glengarry, on the ground of expense to the defendants.—There were four defendants in the cause, all of whom resided in the county of Dundas and the plaintiffs resided in the county of York. The cause of action, it was said, arose in the county

of Hastings, where two of the defendant's witnesses resided, and a third witness resided in the county of Dundas. It was said that the plaintiff would be the chief, if not the only witness in his own favor. One of the defendants swore that he himself and two other of the defendants, would be examined on the part of the defendants.

Burns, J.—I do not see that, irrespective of the witnesses of the parties, it is any legitimate ground for removing the venue from one county to another that there happens to be a greater number of persons as parties to the suit on the one side than upon the other. I cannot recognize that the statute enabling parties to be witnesses, and to give evidence in their own favor, introduces or establishes any such principle. Admitting that the plaintiff will be the chief or only witness on his own behalf, it does not appear to me any sufficient reason for changing the venue from the place where he has chosen to lay it to the place where the defendants reside, that three of the defendants will give evidence in their own behalf. Irrespective of this, it is stated that one of the defendants' witnesses resides in the county of Dundas, and two reside in the county of Hastings, in which county it appears the cause of action arose. Speaking simply of the expense to the parties, I should say it would be more expensive to take two persons from the county of Hastings to Dundas, than to bring one from Dundas to Hastings. The defendants do not ask the venue to be taken to the county where the cause of action arose, but

desire it to be taken to the county where they themselves reside, because of the expense it will be to them to come to the county of York, where the plaintiff resides. As regards the expense, putting aside the question of what that may be as respects the parties themselves, I do not see that it would be so much when once the county in which the cause of action arose is abandoned, as to justify me in granting what the defendants ask: I have no objection, if the defendants desire it, to make an order to change the venue to the county of Hastings, where the cause of action arose; and if they do not elect to take that, then the summons must be discharged.

McGregor v. Batson.

Jurisdiction of the County Court—Costs.

An action on the case, founded on the Statute of Merton, may be maintained in the County Court; and therefore, where the plaintiff had a verdict for 4*l.*, and no certificate was granted, an application for Queen's Bench costs was refused.

This action was founded on the provisions of the Statute of Merton, 51 Hen. III., stat. 41, for distraining beasts of the plough, when there was other property which might have been taken for the rent. The plaintiff at the trial recovered a verdict for 4*l.*

The question was whether the action could have been maintained in the County Court.

Burns, J.—It appeared from the declaration that the action was not brought to recover the value of the cattle distrained; for I suppose from the way the count is framed the defendant got his cattle back. The action therefore is, strictly speaking, one of infringement of the laws.

The distinction between actions of tort to personal chattels, which may be distinguished into choses in possession, and choses in action, with a view to determine what the legislature intended should come within the jurisdiction of the County Court, was fully considered by me in Hinds v. Dennison, 1 Chitty's Rep. 194. I am unable to distinguish this case in principle from that one. An action of trover or trespass would have lain against the defendant, as well as an action founded upon the provisions of the statute. This is apparent from the case of Gorten v. Faulkner, 4 T. R. 569, and Hutchins v. Chambers, 1 Bur. 579. The older forms of declaration are in trespass, and conclude *contra pacem*. The Statute of Marlbridge, ch. 4, gave a remedy where there was an excessive distress, and in such case the action must be founded altogether upon the statute; and an action of trover or trespass will not lie. It is attempted to put the case on a different footing from the action of trover or trespass, because it is said that it is a duty attached to the person, not to distrain beasts of the plough while there are other things that may be distrained, and that, though such duty does arise in respect of some personal chattels relatively, yet that the ground of complaint is a thing or matter rather attached to the person, and may be said to be more like the case of Bell v. Jarvis, *(a)*. I do not see the force of the argnment, because, if it were so, then a great variety of actions might on that principle be withdrawn from the consideration of the County Court. Whenever the act complained

(a) 6 U. C. R. 423.

of is a violation of some positive law, it may always be said that it is contrary to a person's duty to violate the law, and that it is a personal duty in every one to obey the law; and therefore, when a breach of that duty is committed, the action partakes so much of a personal character that it no longer relates to personal chattels. I have remarked that I think the form of action makes no difference—the true test is whether the tort does relate to a personal chattel of the plaintiff, which he either has in possession or to which he has the right of possession. Here the complaint is in respect of beasts of the plough distrained, and for which an action of trespass or trover might have been maintained. The plaintiff waives the trespass; and propably he could not have maintained trover, because the property being returned to the plaintiff, there was no conversion, and the action is then made a special one, the act having been committed, as it is said, contrary to the statute. There was no duty whtch the defendant committed a breach of, irrespective of the chattels, and the tort most certainly related to the chattels, and the chattels alone. I see no reason why the action could not as well have been maintained in the present form in the County Court, as it could in the form of trespass or trover.

The plaintiff is not entitled to tax full costs without a judge's certificate.

McIntosh v. Pollock.

Interlocutory judgment in County Court.—Costs of.

The fees for judgments "entered" in the schedules to 9 Vic. ch. 7, are to be referred only to interlocutory, and not to final judgments.

A judge in chambers may make an order on a deputy clerk of the crown to refund costs improperly received.

This was an application against the deputy clerk of the Crown at Hamilton, to compel him to refund the sum of 14*s.*, which he received from the plaintiff upon signing interlocutory judgment twice in this cause, beyond what it was contended he had a right by law to take. The cause was depending in the superior jurisdiction of the court, and therefore the question turned upon the construction to be placed upon the tariff of fees annexed to the County Court Act, 8 Vic., ch. 13, and the schedule of the amended act of 9 Vic. ch. 7. The first interlocutory judgment was set aside upon payment of costs, which costs were taxed at the principal office in Toronto, and the sum of one shilling and sixpence allowed independent of the charge for filing, according to the custom of the office in Toronto, and as the tariff had been interpreted there, and in the office of the County Court clerk at Toronto. The plaintiff had, it appeared, paid the sum of eight shillings and sixpence beyond the filing, for the signing of the judgment. A second interlocutory judgment was signed, for which the deputy clerk received eight shillings and sixpence, refusing to sign the judgment until that sum was paid. It appeared that the deputy clerk insisted upon receiving the same fees as had

been received by the County Court clerk; and that brought up the question as to the proper interpretation of the County Court tariff. It seemed that at Hamilton the County Court clerk, in addition to the sum of 1*s.* 6*d.*, for signing an interlocutory judgment under the tariff annexed to 12 Vic. ch. 31, accustomed to receive 5*s.* for the fee fund, and 2*s.* for himself under the schedules to 9 Vic., ch. 7, upon every interlocutory as well as upon every final judgment; and it was contended upon this application, that as the deputy clerk of the crown had received the same charges, it was illegal, and these sums should be ordered to be refunded. It was also contended that a judge in chambers had no authority to make such an order; but that the application should have been made to the court.

Burns, J.—I have no doubt of the authority of a judge in chambers to make such an order as is asked for in the present instance; but if the order should be disobeyed, then to enforce its application would have to be made to the Court. With respect to the proper interpretation to be put upon the County Court tariff, I never have had any doubt, and I have none now. The expressions "Every judgment entered 5*s.*;" and "Every judgment entered 2*s.*," mean a final judgment, and not an interlocutory judgment, and a little attention to the definition of terms will at once convince that it is so. Whatever latitude may have been allowed in the liberal construction, so as to benefit the clerks of the County Courts, of the expression in the tariff annexed to 8

Vic., ch. 13, "Entering every judgment 1*s.* 6*d.*," is not now the question; but the question is, how the schedule to the statute 9 Vic., ch. 7, is to be interpreted. The meaning of the word "entered" is, after the pleadings and proceedings are transcribed at length upon the roll; and "judgment entered" is always applied to the final judgment, and never to the interlocutory judgment, unless that it be a final judgment—as, for instance, in an action of debt, when no writ of enquiry is sued out. In all cases where the interlocutory judgment is not a final judgment the expression used is that of "signing" judgment. The signing of judgment and entering of judgment are two different things. The signing of judgment is the marking of the clerk that it is signed, and the memorandum in respect of it is signed by him; but the entering of judgment is the transcribing of the pleadings and proceedings upon the roll to the award of execution; and when that is done the judgment is then said to be entered, but it is not entered before that is done. In England the common practice was, and is, to sue out execution upon signing a final judgment before entering it; but in this country the practice has always been different; and it has commonly been, I suppose almost invariably, the case that the judgment was entered before suing out the execution. The term "entered" means a judgment entered for the purpose of suing out an execution, and not a judgment required for the purpose of suing out a writ of inquiry, or carrying down a record to assess dam-

ages. That the legislature understood it in that light is to me apparent, when the next item in schedule B. of 9 Vic., ch. 7, is looked at—"taxing costs when no judgment is entered;" the word "entered" here most certainly applies to a final judgment, and if so in that instance, it must receive the same interpretation in the other.

The summons must therefore be made absolute for an order to refund the 14*s.*; but as the case is one of construction, and as there have been different opinions on the subject, I do not order the defendant to pay costs.

REPORTS OF POINTS OF PRACTICE.

AS DETERMINED IN CHAMBERS BY THE JUDGES OF THE COURTS OF QUEEN'S BENCH AND COMMON PLEAS.

ABSENT DEFENDANT.

14 & 15 *Vic., ch.* 10. *Absent defendant.*] Where a suit is commenced under ordinary circumstances an alias process can. not be issued as against an absent defendant, under 14 & 15 Vic., ch. 10. *Semble*, that in actions under the above statute (as in othes cases), where the cause of action is within the county court, the Plaintiff may proceed in the Queen's Bench, marking the papers "inferior jurisdiction."—*Hunt v. Ford and Park*, 202.

ACCEPTANCE OF OFFICE.

What is snfficient.] See "Municipal Elections.]

ADDITION.

See "Affidavit," 3.

AFFIDAVIT.

See "Arrest," 3.

1. *Description of papers annexed to.*] An affidavit is *not insuffirient* because it does not mention the papers separately which are annexed to it, nor positively state to what such papers are annexed, thereby designating them as "*the annexed are*," *&c.—McKay v. Dearmid*, 1.

2. *Of service of plea.*] The affidavit of the service of the copy of the plea should state on whom such service was made, and that the paper served was a true copy of the original.—*Ib.*

3. *Designation in affidavit. Reference to jurat.*] An affidavit by "*I.B., the defendant in this cause*," is sufficient without any further addition. The jurat may be referred to, to explain the date of a fact deposed to in the affidavit.—*Lyman v. Brethron*, 108.

Entitling.] On an application to set aside a ca. sa. in the original action, or proceedings againsr bail, the affidavits are rightly entitled in the action against the bail.—*Beattie v. McKay et al*, 56.

AGENCY.

See "Costs," 4.

ALDERMAN.

Of Kingstov, qualification for.] See "Kingston."

AMENDMENT.

Of Writ.] See "Arrest," 4. Costs," 4.

APPEARANCE.

Omission to enter.] See "Irregularity."

ARREST.

1. *Arrest of married woman. Writ set aside.*] Where the defendant, being a married woman, and known to be so by the plaintiff, was arrested on a writ of *ca. re.*, both writ and arrest were set aside with costs. When the writ of *ca. re.* is only against the wife and is irregular against her, the husband cannot be compelled to appear.—*Foley* v. *White and Wife*, 51.

2. *Arrest. Privilege of Parliament.* 1 *Geo. III. cx.* 1, *sec.* 3; 2 *Geo. IV. ch.* 1, *sec.* 6; 1 *Vic. ch.* 63, *sec.* 33; 13 *&* 14 *Vic. ch.* 53. *sec.* 96.] A member of the Provincial Parliament is privileged from arrest for a period of forty days after the prorogation or dissolution of Parliament, and for the same period before the next appointed meeting.

Defendant made an application to set aside an arrest for irregularity; his application was defeated, not on the merits, but owing to the plaintiff's applying for and obtaining an order to amend. Held, therefore, that plaintiff was still at liberty to move after the amendment against the arrest on the ground of illegality.—*Wadsworth et al.* v. *W. H. Boulton*, 76 See 9 *U. C. R.*, 546

3, *Debt contracted in foreign country. Debtor and creditor foreigners. Law of arrest. Affidavits.* 2 *Geo. IV. ch.* 1, *sec.* 10.] If the affidavit of debt, and intention to leave the country be a positive one, neither can the question of the actual existence of the debt, nor the circumstances under which it was contracted, nor the conduct of the defendant after it was contracted. be tried upon affidavits, for the purpose of permitting an arrest. In England the merits of an arrest are tried on affidavits, but that arises from the alteration of the law by the statute 1 *&* 2 *Vic. ch.* 110.—*Semble*, that if contrary to the policy of our laws of arrest

to permit one foreigner to follow another to this country and arrest him for a debt contracted abroad.—*Frear v. Ferguson*, 144.

4. *Wrong direction of Writ. Amendment. Second Arrest.*] Where defendant was arrested on a writ issued and tested on the 3rd January of 1852, and directed to the sheriff of the United Counties of Wentworth and Halton; *Held* that since the 1st of January, 1852, there was no such officer; and the arrest was set aside with costs, and the bail bond ordered to be given up to be cancelled, the defendant undertaking to bring no action, and entering a common appearance.—*Held*, that the writ might be amended, but the copy not.—On application to be allowed to arrest defendant on the amended writ, the judge declined to give such permission.—*Lyman* v. *Brethron*, 108.

AWARD.

Rule nisi to set aside defects in.] A rule nisi to set aside an award was discharged with costs, because it was not drawn up on reading the award or copy, nor the submission, nor the rule making the submission a rule of Court.—*Jacobs* v. *Ruttan*, 138.

BAIL.

See "Affidavit," 4.

Bail are not bound to move to set aside a ca. sa. against their principal until proceedings are instituted against them. In order to proceedings against the bail, the writ of ca. sa. must be in the hands of the sheriff to whom it is directed four days (exclusive) before the return day thereof.—*Beattie* v. *McKay et al.*, 56.

BY-LAW.

12 *Vic. ch.* 81. *How far certain sections of, apply to Township Municipalities.*] The provisions of 12 Vic. ch. 81, secs. 6 & 7, apply only to cases where the by-law has been made by District Council, or shall be made by the County Council, and do not apply to the case of the Township Council. Therefore, where a township municipality had divided the township into rural wards, and by the same by-law appointed places for the elections; it was held by *Burns, J.* that it was not necessary for such by-law to have been published in the official Gazette, nor in any newspaper, nor copies thereof to have been posted in each Township, nor that a copy thereof under seal, should have been delivered to the person appointed to hold the election.—*The Queen ex rel. Woodward* v. *Ostrom et al.*, 47.

BYTOWN.

Qualification for Town Councillor of.] The qualification necessary for a Town Councillor for Bytown, at an election held in January, 1851, is that set forth in 5th section of 10 & 11 Vic. ch. 43. He must be a resident householder.—*The Queen ex rel. Hervey* v. *Scott*, 88.

CA. SA.

See "Bail."

Semble; It is not necessary that fifteen days should elapse between the teste and return of the writ of ca. sa.—eight days are sufficient.—*Beattie* v. *McKay et al.*, 56.

COLLECTOR'S ROLL.

See "Municipal Elections," 8, 10.

COMPUTE—REFERENCE TO.

Judgment must be *actually* signed before an order for a re-reference to the master to compute can be made.—*Gillespie v. Marsh*, 5.

COSTS.

1. *Defendant arrested under bailable writ. Costs. 49 Geo. III. ch. 4. Plaintiff's costs. What "recover" refers to.*] Where a defendant arrested under a bailable writ has obtained a rule granting him his costs under the provincial statute 49 Geo. III. ch. 4, the plaintiff is not entitled to tax costs on entering the judgment. The effect of the first clause of this statute is to deprive the plaintiff of all his costs of suit. And the word "*recovered*" in the latter part of this clause, as well as the word "*recover*" in the former part, refers to the amount for which the *verdict* was *given*.—*Higson* v. *Phelan*, 7.

2. *Disclaimer. Costs. Municipal Elections.*] Where defendant personally contested the election, but on its being moved against, sent in a disclaimer, praying to be relieved from costs, because being duly elected he was obliged to accept the office under a penalty: *Held*, that there appeared no ground why he should be so relieved.—*Queen ex. rel. Featherstone* v. *McMonies*, 137.

3. *Action against Magistrate. 14 & 15 Vic. ch. 54.*] Two actions were brought against a justice of the peace, for trespass and false imprisonment. On the 30th of August, 1851, a verdict for plaintiff was found in one case of 2*l.* 10*s.*,

and in the other of 1s. *Held*, that the stat. 14 & 15 Vic. ch. 54 applied; and no tender of awards being made or pleaded, plaintiff was entitled to his full costs in both suits. —*Keeley et ux. v. Raile, and Finlay v. Raile*, 155.

4. *Service of amended declaration without payment or tender of costs, as ordered by rule granting amendment. Waiver. Special agency. Rule of Court.*] The action was brought in the county of Lincoln; defendant resided at Cobourg; and proceedings were carried on in the office of the Deputy Clerk of the Crown at Niagara. Defendant had no booked agent in the office at Niagara, and demurred to the declaration, employing L. as agent, to file and serve the demurrer, but, as he swore, no further. Leave to amend on payment of costs being granted, plaintiff served his amended declaration on L. without tendering costs; L. transmitted it to defendant, who neglected to plead, and plaintiff signed interlocutory judgment. Defendant subsequently tendered pleas through L., which were refused; *and held*, that the service of the amended declaration and subsequent proceedings must be set aside with costs, for irregularity—the transmission by L. to defendant of the amended declaration being no waiver.—*Brown v. Goodeve et al.*, 153.

5. *Costs of contested Elections.*] The power of a judge, under 13 & 14 Vic. ch. 64, schedule A. No. 23, to award costs for or against the relator, or defendant, or returning officer, "in disposing" of every case, extends only and has reference to the FINAL determination of each case.—*Reg. ex rel Arnott v. Marchant*, 167.

6. *Election of Township Councillors. Disclaimer. Costs. —12 Vic. ch.* 81, 13 & 14 *Vic. ch.* 64.] The defendant filed a disclaimer, but a day too late; and *held*, that he must pay the relator his costs.

The returning officer having by order of a judge become a party, but acquitted and discharged, and relator's statement not being strictly correct; *Held*, that the relator should pay the officer his costs.—*Ex rel. Hawke v. Hall*, 132.

7. *Jurisdiction of the County Court. Costs.*] An action on the case, founded on the Statute of Merton, may be maintained in the County Court; and therefore where the plaintiff had a verdict for 4*l.*, and no certificate was granted, an application for Queen's Bench costs was refused.—*McGregor v. Batson*, 205.

8. *Interlocutory judgment in County Court. Costs of.*]— The fees for judgments "entered" in the schedules to 9

Vic., ch. 7, are to be referred only to interlocutory and not final judgments.—*McIntosh v. Pollock*, 208.

COUNTY COURT.

Jurisdiction of.] See "Costs," 7.

DEMURRER.

Frivolous Demurrer.] Motion to set aside a demurrer as frivolous.—*Bain v. Bain*, 136.

EJECTMENT.

1. 12 *Vic. ch.* 63, *sec.* 36, *Declaration in ejectment.*] The declaration in ejectment is not included in the proviso to section 26 of 12 Vic. ch. 63, but may be served between the 1st of July and 21st August.—*Doe dem. Shortts v. Roe*, 106.

2. *Service of summons in ejectment. Venue.*] The county marked in the margin of a summons in ejectment is to be taken as the county where such writ was issued, and not as the venue laid in the cause. It is not necessary to read and explain the purport of such summons to the party served.—*Riddell v, Briar,*, 198.

ENTITLING.

Of affidavit to set aside ca. sa. &c.] See "Affidavit," 4.

EXECUTION.

See "Poundage."

FALSE PLEA.

Power of Judge. Plea false in fact.] It is in the power of a judge to strike out a plea false in fact, when a proper case is made out for doing so.—*Bowes and Hall v. Howell, et al.* 134.

FILING.

See "Nullity."

Plea.] See "Pleading."

Return of writ of trial.] See "Waiver."

"INFERIOR JURISDICTION."

Omission to mark papers.] See "Irregularity."

INTEREST OF RELATOR.

See "Municipal Elections," 4.

INTERLOCUTORY JUDGMENT.

See "Costs," 8.

INTERPLEADER.

Power of judge in chambers over parties in interpleader suit.] An interpleader suit, in which the trustees of this defendant and this plaintiff were respectively plaintiffs and defendant, was arranged on the understanding that all costs, including the sheriff's fees, &c., should be paid to the plaintiff's attorney; the costs, except the sheriff's fees, were paid by an order on the trustees by their attorney, who stated that, as soon as the sheriff's fees were taxed, H., one of the trustees, would pay them. These trustees subsequently transferred all the property which this defendant had previously assigned to them to other trustees, the sheriff's fees still being unpaid; and H. swore that he was not aware of these fees being due until after the transfer. Plaintiff's attorney sued the trustees for the fees, but was nonsuited; and the judge in chambers declined to make an order for the trustees to pay them, considering he had no jurisdiction over them.—*Dunn v. Boulton*, 195.

IRREGULARITY.

See "Municipal Elections, 8. "Nullity."

Appearance,—Irregularity,—Waiver.] An omission to enter an appearance is an irregularity merely, not a nullity, and unless promptly complained of, will be cured by waivar. The failing to mark the judgment paper "Inferior jurisdistion," is an irregularity which may be cured by waiver.—*Scadding v. Welch*, 105.

JUDGE IN CHAMBERS.

See "False Plea," "Interpleader," "Municipal Elections," 10, "Summons," 3.

May make an order on a Deputy Clerk of the Crown to refund costs improperly received.—*McIntosh v. Pollock*, 208.

JUDGMENT.

Interlocutory.] See "Costs," 8.

JUDGMENT AS IN CASE OF NON-SUIT.

1. *Judgment as in case of non-suit. Affidavits.*] On a rule for judgment as in case of non-suit for not going to trial, time was given to obtain an affidavit from the plaintiff, who lived at a distance, that the suit was settled, but no such affidavit being filed at the expiration of the given period, the rule was made absolute.—*Gibb et al. v. Keegan*, 4.

KINGSTON.

See "Municipal Elections," 5.

1. *Qualification for Alderman of.*] The qualification necessary for a person to be elected Alderman of Kingston in January, 1851, was the same as that required by 9 Vic. ch. 75, sec 13.—*The Queen ex. rel. Linton v. Jackson*, 18.

2. The election of a Municipal Councillor for one of the wards of the City of Kingston on the 6th and 7th of January 1851, held invalid, upon the ground of his not having been a resident householder within the city, or any part of the adjacent county of Frontenac not more than three miles from the Market Square, for *four* years *next* before the election.—9 Vic. ch. 75 sec 13; 12 Vic. ch. 81 sec. 298; 13 & 14 Vic. ch. 64 sec. 17.—*The Queen on the relation of Henry Bartliff, v. JohnShaw*, 153.

MARRIED WOMAN.

See "Arrest," 1.

MUNICIPAL ELECTIONS.

See "Bytown," "Kingston," "Township Councillor," "Summons."

1. *Acceptance of Office.*] A public declaration of acceptance of office, made in presence of the returning officer and the electors directly after the returning officer had published the result, is a sufficient acceptance under the statute 13 & 14 Vic. ch. 64, schedule A, No. 23.—*The Queen ex. rel. Linton v. Jackson*, 18.

2. *Allowance of Recognizance.*] There is no necessity for taking out a distinct rule or order for the allowance of the recognizance.—*Ib.*

3. 13 & 14 *Vic.* 67. *Effect of.*] The new assessment law, 13 & 14 Vic. ch. 67, does not affect municipal elections until after 31st December, 1851.—*Ib.*

4. *Relator's interest. Statement and proof of.*] Where a relator declares that he has an *interest in the election* as a voter for *said ward*, this, coupled with a previous complaint that defendant was unduly elected alderman, &c., sufficiently identifies him as declaring himself to be a *municipal voter*, though he does not use the precise term "*municipal voter*," required by the statute 12 Vic. ch. 81, sec. 146. An objection that, though the relator's interest is sufficiently alleged,

there is no sufficient proof of it to enable the court or judge to order the issue of the writ, cannot be urged on the return of the writ, where such allegation is not denied, and no proof offered to shew that relator had not the interest claimed.—The interest of the relator is not established by the ordering of the writ.—*The Queen ex. rel. Shaw v. McKenzie*, 36.

5. *Property qualifications.* 9 *Vic. ch.* 75, *sec.* 13.] It is not necessary under 9 Vic. ch. 75, sec. 13, that the property should be assessed in the name of the person possessed of it to his own use. A landlord is so possessed whose tenants occupy the premises, and he may put together real properties, some occupied by himself and some by tenants, to make up the assessed value required by the statute.—*Ib.*

6. 12 *Vic. chaps.* 80, 81. 13 & 14 *Vic. ch.* 64, *sec.* 17; *ch.* 67, *ch.* 83. *Relator's statement, how treated. Course when voters had no notice of objections to candidate for whom they voted.* 59 *Geo.* III., *ch.* 7.] A relator's statement, supported by his affidavit, is looked upon as a material traversable allegation in a declaration; and if defendant omit to answer it, he must be taken to admit that it is true. Where it does not appear that the voters at an election had notice of any objection to the candidate for whom they votod (though a valid one exists,) a new election will be granted; but the relator, though next in order to him, will no be declared entitled to the office. —*The Queen ex. rel. Hervey, the younger*, v *Scott*, 88.

7. *Election for township councillors. Power of returning officer.* 12 *Vic. ch.* 81. 14 & 15 *Vic. ch.* 109.] A vote which the returning officer received and entered in the poll book, appeared subsequently to have been wrongly received, and the returning officer struck it out, which produced an epuality of votes for the candidates, and the returning officer gave the casting vote. It appeared that other votes had been improperly received, which being struck out, the candidates would still be equal. *Held*, that the returning officer had no right to strike out a vote he had entered in the poll book, and that under the circumstances the returning officer's vote should not be allowed still to decide the election—but that there should be a new election, and that the returning officer should pay the relator his costs—*Reg. ex. rel. Mitchell* v *Rankin & Dunlop*, 162.

8. *Election for Township Councillor.* 14 & 15 *Vic. ch.* 109, *sch A. Qualification for a voter. Copy of Collector's roll*

not furnished to returning officer.] The copy of the collector's roll, which, by 14 & 15 Vic. ch. 109, sch. A. No. 12, should be furnished to the returning officer, is not conclusive upon a judge when objections are made to the qualification of voters. A party (the gaoler) who lived in apartments in the county gaol, paying no rent, and being lessee of land rated at the annual value of 10*l.* 4*s.*, was held not entitled to vote at the election of councillors, as not being a householder within the meaning of 14 & 15 Vic. ch. 109, sch. A. No. 12.

Where the returning officer was not furnished with a copy of the collector's roll, as requiaed by 14 & 15 Vic. ch. 109, sch. A. No. 12: *Held*, that it was irregularity which subjected the election to be avoided, when the objection was taken by one qualified to urge it, although it might not *ipso facto* render the election void: and *held* also, that the acquiescence of the candidates in the election being proceeded with under these circumstances, though it might preclude them from disputing the validity of the election on that ground, could not affect the right of a voter who was no party to such acquiescent arrangement.—*In re Charles v. Lewis & McMahon*, 171.

9. *Election for Township Councillors.* 12 *Vic. ch*, 81.—13 & 14 *Vic. ch.* 64. *Quo Warranto. Costs.*] One Robert Gillis had a farm, through which ran the division line between Wards Nos. 2 and 3. His house stood on that part of the farm included in Ward No. 2, but his barn on the part in Ward No. 3. The Township Municipality passed a by-law that the election of Township Councillors for 1852 "for Ward No. 3" should be held at *Robert Gillis's*. *Held*, that the by-law must be read as meaning on some part of his property in Ward No. 3, as otherwise it would be void. 2ndly. That as the election took place in the house, it was null, being without the limits of the ward. 3rdly. That relator was not by his quasi acquiescence precluded from subsequently raising the objection.—*The Queen, on the Relation of Porter v. Alexander Preston*, 198.

10. Previous to the stat. 14 & 15 Vic. ch. 109, it was not necessary that it should appear on the collector's roll whether the persons therein named were freeholders or householders.—*Reg. ex. rel. Hawke v. Hall*, 182.

11. *Improper conduct of returning Officer. Costs.*] Where the returning officer improperly closed the poll, both candidates having at the time received an equal number of

votes ; and, when in the act of recording his own vote, a vote was tendered by an elector, (who had beeu present a long time without voting) for the candidate against whom the returning officer voted, which he refused to record :—*Held*, that there should be a new election. *Held also*, that under such circumstances, the returning officer should pay the relator's costs, and also the costs of defendant, if he chose to exact them, *Quære*, whether it would be proper for a judge in chambers, under the above circumstances, to have ordered the same of the voter whose vote the returning officer refused to record to be entered on the poll book, instead of ordering a new election.—*Reg. ex rel. Arnott* v. *Marchant*, 190.

NONSUIT.

Judgment as in case of.) See "Judgment as in case of nonsuit.

NULLITY.

Writ and declaration entitled and filed in different courts.—Irregularity. Nullity. 22nd rule of court, H. T. 23 Vic.] The writ and appearance were entitled in the *Common Pleas;* the declaration served and filed was entitled in the *Queen's Bench.* Pleas were *filed* entitled also in Queen's Bench ; but defendant's attorney discovering the mistake made in entitling the declaration, served no *copies* of pleas on plaintiff's attorney, but signed judgment of *non pros.* for want of a declaration: *Held*, per Draper, J., that the declaration must be treated as a nullity; but judgment of *non pros.* was set aside on the merits, on payment of costs. *Semble*—that if the declaration had been filed in the proper office, though entitled wrongly, and the defendant pleaded, filing his plea in the same office, such would be merely an irregularity, and cured by pleading, by rule 22, H. T. 13 Vic.—*Richardson* v. *Ranney et al.*, 71.

OVERHOLDING TENANT.

Overholding tenant. Notice of inquisition. Costs.] In a proceeding by the plaintiff, pretending to be landlord, against the defendant as an averholding tenant, notice of the inquisition not having been served personally, and there being evidence to shew that defendant was not resident on the premises when such notice was served, the notice and all subsequent proceedings were set aside, but without costs. *Semble*, that no motion on behalf of another person, or owner,

could be received, as such person could not be bound by any proceedings against the tenant.—*Goodler, Landlord, v. Cook, tenant*, 151.

PARLIAMENT

Privilege of members from arrest.] See "Arrest," 2.

PLEA.

False.] See "False Plea."

1. *Filing without serving.*] Filing a plea without serving a copy is irregular, under rule of court E. T., 4 Vic. No. 4, but not such an irregularity as to entitle the opposite party to sign judgment, without applying to the court or a judge.—*McKay v. McDearmid*, 1.

PLEADING.

Time for appearing. Pleading, &c. 8 *Vic. ch.* 36. 12 *Vic. ch.* 63.] The extension of time for appearing, pleading, &c., in certain cases to twelve days instead of eight, under the *testatum writ act.* (8 Vic. ch. 36,) is not affected by 12 Vic. ch. 63.—*Marmora Foundry Co. v. Miller*, 102.

POUNDAGE.

Sheriff's right to poundage on execution against the person, goods and lands. 9 *Vic. ch.* 56, *secs.* 2, 3; 7 Wm. IV. *ch.* 3, *sec.* 32; 29 Eliz. *ch.* 4; 5 Geo. II. *ch.* 7; 43 Geo. III. *ch.* 1; 49 Geo. III. *ch.* 4, *secs.* 3, 5; 2 Geo. IV. *ch.* 1, *sec.* 19.] On writs of execution against the *person or goods*, there must be a *taking*, to entitle the sheriff to poundage. If the money be paid *before* the taking, this defeats the right to poundage, but if the money be forced by the act of the sheriff, then, though it does not pass through his hands, his right to poundage accrues. On writs against *lands*, the right to poundage only begins with *the sale* —and the words "AND MADE," used in the tariff, have reference to this act.—*Morris et al. v, Boulton*, 60.

QUALIFICATION.

For Alderman or Municipal Councillor of Kingston.] See "Kingston," 1, 2.

For Alderman of Bytown.] See "Bytown."

Of voters for Town Councillors.] See "Municipal Elections," 8.

Of Township Councillor.] See "Township Councillor."

QUO WARRANTO.

See "Summons," 2, 3, 4.

RECOGNIZANCE.

Allowance of.] See "Municipal Elections," 2.

RELATOR.

Interest of. Statement and proof of.] See "Municipal Elections," 4.

Statement of. Admitted, if not traversed.] See "Municipal Elections," 6.

RETURNING OFFICER.

Power to strike out votes.] See "Municipal Elections," 7.

Improper conduct of.] See "Municipal Elections," 11.

SHERIFF.

See "Poundage."

STATUTES (CONSTRUCTION OF.)

49 Geo. III. ch. 4.—See "COSTS," 1.
9 Vic. ch. 75, sec. 13.—See "MUNICIPAL ELECTIONS," 1.
12 Vic. ch. 63, sec. 36.—See "EJECTMENT," 1.
12 Vic. ch. 81, secs 6 and 7.—See "BY-LAW."
12 Vic. ch. 81, sec. 146.—See "SUMMONS," 2.
13 & 14 Vic. ch. 64, Sched. A, No. 23.—See "MUNICIPAL ELECTIONS," 1.—"COSTS," 5.
14 & 15 Vic. ch. 10.—See "ABSENT DEFENDANT,"
14 & 15 Vic. ch. 54.—See "COSTS," 3.
14 & 15 Vic. ch. 109, Sched. A. No. 12.—See "MUNICIPAL ELECTIONS," 8.

SUMMONS.

See "Ejectment," 2.

1. *Second Summons where first abandoned.*] A party is not precluded from proceeding on a summons because one had been already taken out and served on the opposite party for the same purpose, but owing to a defect had been abandoned. —*McKay v. McDearmid,* 1.

2. *Summons in the nature of a quo warranto, teste of.*] If a summons in the nature of a *quo warranto* is not tested on the day it is issued, it is an irregularity; but if an appearance be entered, the irregularity is thereby waived.—*The Queen ex rel. Linton v. Jackson.* 18.

3. *Construction of* 13 & 14 *Vic. ch.* 64, *Sched. A. No.* 23.] *Semble*, That the words in 12 Vic. ch. 81, sec. 146, as amended by 13 & 14 Vic. ch. 64, schedule A. No. 23, do not require the writ ordered by the court in term time to be sued out in term time; but that if the application be made in term, the court shall give the order for the writ; if in vacation a *fiat* shall be given by a judge for it.—*Ib.*

4. *Quo warranto. Abandonment of the first summons.—Power of judge in chambers.* 12 *Vic, ch.* 81. 13 & 14 *Vic, ch.* 109. *Quaiification for township councillor.* The writ of summons which first issued in this case was abandoned for informality, before cause shewn; not by leave of the court, or by quashing the first writ, but merely at the will of the relator, he having served a notice on the defendant that he need not appear to such writ and the other papers served on him, he (the relator) having abandoned the same. On the argument in the present case it was objected by the defendant's counsel that under these circumstances it was not competent for the learned judge to order the issue of a second writ of summons. But *held* by *Sullivan*, J., that the judge by whose order the writ of summons issued, standing in the place of the court, it was not competent for the judge in chambers to review the proceedings had before the judge so put in the place of the court, and consequently that he could not entertain the objection.—*Reg. ex rel. Metcalf v, Smart*, 114.

5. *Service of summons in the nature of quo warranto.*] Personal service of a writ of summons in the nature of a quo warranto cannot be dispensed with, except in the case provided for by the act 12 Vic. ch. 81, sec. 148.—*Reg. ex rel. Arnott v. Marchant & Luddingtou*, 167,

TENANT OVERHOLDING.

See "Overholding tenant."

TOWNSHIP COUNCILLOR.

1. *Township councillor. Who eligible.* 12 *Vic, ch.* 81, *sec.* 132.] A person holding the office of local superintendent of schools, entitled to a salary to be paid by the county treasurer, is not disqualified from being elected township councillor by 12 Vic. ch. 81, sec. 132.—*Reg. ex rel. Arnott et al. v. Marchant*, 190.

2. *Qualification of.*] To entitle a person to be elected a township councillor, under 12 Vic. ch. 81, and 14 and 15 Vic.

ch. 109, it is necessary that he should be rated *by name* on the assessor's roll.—*Reg. ex rel. Metcalf v. Smart*, 114.

3. 14 & 15 *Vic. ch.* 109. *Qualification of township councillor. Collector's roll.*] Since the 14 & 15 Vic. ch. 109, it is not necessary to the qualification of a township councillor that his name should appear on the collector's roll.—*Reg. ex rel, Laughton v. Baby*, 130.

VENUE.

See "Ejectment," 2.

Change of venue. Application for refused.] Where the number of parties to a suit is greater on one side than the other, the majority cannot have the venue changed to the county in which they reside, (not being that in which the cause of action arose), because they are to be examined as witnesses on their own behalf.—*Rose v. Cook et al.*, 204.

VOEERS.

For township Councillors. qualification of—Householders.

See "Municipal Elections," 8.

WAIVER.

See "irregularity." "Municipal Elections," 8, 9. "Summons," 1, 2.

Filing return af writ of trial. Signing judgment. 8 *Vic. ch,* 13 *sec,* 53. *Waiver of irregularity. Estoppel.* Where the plaintiff was proceeding on the 5th of July to file the return of a writ of trial, and the defendant, being about to move on the at day to set aside the verdict and for a new trial, had need of the writ and return to make his motion before the judge in chambers, and the plaintiff allowed him to take them for such purpose before they were *actually* filed, to avoid the trouble of procuring a judge's order for them, (which, had they been actually filed, would have been necessary), *Held*, that the writ might be considered and treated as filed on that day; and consequently, though it was not actually filed until the 8th July, and the plaintiff signed final judgment on the 12th July. the defendant was estopped from contending that the statute 8 Vic. ch. 13 sec. 53, had not been complied with—six days not having elapsed between the actual filing of the writ and the signing judgment.—*Morlaud al, v. Webster*, 52.

WRIT OF TRIAL.

See "Waiver."